No. 8412

United States

Circuit Court of Appeals

For the Ninth Circuit.

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, a copartnership,

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of GOLDEN STATE ASPARAGUS COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Parker Printing Company, 545 Sansome Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

TORREGANO & STARK, Esqrs.,
805 Mills Bldg.,
S. F., Calif.,
Attorneys for Defendants and Appellants.

DINKELSPIEL & DINKELSPIEL, Esqrs.,
333 Montgomery St.,
S. F., Calif.,
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed Jan. 22, 1935.

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 19830-L

GEORGE N. EDWARDS, as Receiver in Equity of Golden State Asparagus Company, a corporation,

Plaintiff,

vs.

HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN, JOHN DOE AND RICHARD ROE, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, and H. ROTHSTEIN & SON, a copartnership,

Defendants.

COMPLAINT FOR DAMAGES BREACH OF CONTRACT [1*]

Comes now the plaintiff above named and for cause of action against the defendants above named alleges as follows:

I.

That at all of the times herein mentioned GEORGE N. EDWARDS has been and now is the duly appointed, qualified and acting Receiver in Equity of GOLDEN STATE ASPARAGUS COMPANY, a corporation, having heretofore been appointed by the above entitled court in an action pending in said court entitled: "American Can Company, a corporation, plaintiff, versus Golden State Asparagus Company, a corporation, defendant" and being numbered therein 2683-L.

II.

That the plaintiff herein is and at all times herein mentioned was a resident and citizen of the State of California. [2]

III.

That at all times herein mentioned H. ROTHSTEIN & SON was a copartnership consisting of HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN, JOHN DOE AND RICHARD ROE, doing business as such under the firm name and style aforesaid.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

IV.

That all of said copartners were and are citizens and residents of the State of Pennsylvania.

V.

That defendants herein, and each and all of them, are citizens and residents of the State of Pennsylvania.

VI.

That the true names of defendants sued herein under the fictitious names of JOHN DOE and RICHARD ROE are unknown to plaintiff at this time and plaintiff prays leave that when their said true names are ascertained the same may be inserted herein wherever proper.

VII.

That at all of the times herein mentioned plaintiff as such receiver has been engaged in the business of growing asparagus in the State of California and marketing said asparagus both in the State of California and throughout the United States.

That on or about the 13th day of February, 1934, at the City and County of San Francisco, State of California, plaintiff as such Receiver, and defendants above named, made and entered into a contract in writing, wherein and whereby plaintiff agreed to sell, and said defendants agreed to buy all of the bunch asparagus to be thereafter grown by plaintiff during the 1934 Season and up to and including April 10, 1934, at the price of $2.00 per

crate f.o.b. cars Isleton, California, [3] and whereby defendants agreed to furnish plaintiff with a good and sufficient bank guaranty covering and guaranteeing to plaintiff the payment of the aforesaid purchase price.

VIII.

That immediately after entering into said agreement, as aforesaid, and before plaintiff could or was required to perform the said contract and commence delivery of the said asparagus, defendants breached said contract in that they refused to furnish said bank guaranty in accordance with the contract and notified plaintiff that they would refuse to accept delivery of the asparagus in accordance with the terms of that contract.

IX.

That plaintiff at all times was ready, able and willing to perform the terms of said contract on his part to be performed.

X.

That during said 1934 season and during the term provided for in said contract plaintiff grew and there would have been available for delivery had said contract not been breached by said defendants as aforesaid, the total quantity of asparagus in the amount of 15,161 crates, for which plaintiff would have received under the contract, at the contract price thereof from defendants, the sum of $30,322.00.

XI.

That at the times said asparagus would have been ready for delivery in accordance with the said con-

tract there was an available market for the said goods and upon said market the market or current price for the said goods at the times when the same ought to have been accepted by defendants was in the total sum of $22,547.85; that by reason of the premises and foregoing facts plaintiff has been damaged in the sum of [4] $7,774.15, which is the loss directly, naturally and proximately resulting in the ordinary course of events from the defendants aforesaid breaches of said contract.

XII.

That jurisdiction of this case arises and is conferred upon this Honorable Court by reason of the diversity of citizenship of the parties hereto and that the amount in dispute exceeds the sum of $3,000.00 exclusive of costs and interest.

WHEREFORE, plaintiff prays judgment against defendants in the sum of $7,774.15, together with interest thereon at the legal rate from date of filing of this complaint, and his costs incurred herein; and for such other and further relief as is meet and proper in the premises.

DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiff
333 Montgomery Street, 14th Floor,
San Francisco, California. [5]

United States of America,
State of California,
City and County of San Francisco.—ss.

GEORGE N. EDWARDS, being first duly sworn, deposes and says: that he is the Receiver in Equity of the Golden State Asparagus Company, a corporation, plaintiff in the foregoing proceeding; that he has read the foregoing Complaint and knows the contents thereof; that the same are true of his own knowledge, except as to the matters which are therein stated on information or belief, and that as to those matters, he believes them to be true.

GEORGE N. EDWARDS

Subscribed and sworn to before me this 19th day of January, 1935.

[Seal] MARK E. LEVY

Notary Public in and for the City and County of San Francisco, State of California. [6]

[Endorsed]: Filed Feb. 21, 1935.

Receipt of a copy of the within Answer is hereby admitted this 20th day of February, 1935.

DINKELSPIEL & DINKELSPIEL

[Title of Court and Cause.]

ANSWER.

Now come HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN and H. ROTH-

STEIN & SON, a copartnership, the defend- [7] ants above-named, and by way of answer to plaintiff's complaint, admit, deny and allege as follows:

I.

Admit all of the allegations contained in paragraphs I. and II.

II.

Answering paragraph III, admit that during all of the times herein mentioned H. Rothstein & Son was a copartnership consisting of Henry Rothstein, M. H. Rothstein and I. Rothstein, but deny that John Doe and Richard Roe or either of them are members of said copartnership.

III.

Answering paragraph IV, admit that the copartners above-named were and are citizens and residents of the State of Pennsylvania.

IV.

Answering paragraph V, admit that the defendants Henry Rothstein, M. H. Rothstein and I. Rothstein are citizens and residents of the State of Pennsylvania.

V.

Deny generally and specifically each and every allegation contained in paragraphs VII, VIII, IX, X, XI and XII.

As a second separate and distinct defense defendants allege as follows: [8]

I.

Defendants reiterate and incorporate all of the allegations contained in paragraphs I, II, III, IV and V of defendants' first defense with the same force and effect as if fully set forth herein.

II.

Answering paragraphs VII, VIII, IX, X, XI and XII, defendants deny generally and specifically each and every material allegation therein contained except as hereinafter specifically admitted, and in that connection defendants allege the true facts to be as follows: That on or about February 13, 1934, the plaintiff offered to sell to defendants all asparagus shipped from Golden State Asparagus Company up to and including April 10, 1934, at Two ($2.00) Dollars per crate FOB Isleton, providing that a satisfactory bank guarantee was given immediately and that all drafts against shipments would be paid. That no satisfactory bank guarantee was ever given by defendants.

As a third separate and distinct defense defendants allege as follows:

I.

Defendants reiterate and incorporate all of the allegations contained in paragraphs I, II, III, IV and V of defendants' first defense with the same force and effect as if fully set forth herein.

II.

Answering paragraphs VII, VIII, IX, X, XI, and XII, defendants deny generally and specifically

each and every [9] material allegation therein contained except as hereinafter specifically admitted, and in that connection defendants allege the true facts to be as follows: That on or about February 13, 1934, plaintiff and defendants entered into negotiations with reference to the purchase by defendants of all the asparagus shipped from the Golden State Asparagus Company up to and including April 10, 1934. That as a result of said negotiations plaintiff and defendants agreed to enter into a written contract of sale of said asparagus by plaintiff to defendants. That no written contract was ever tendered by plaintiff or by anyone acting on plaintiff's behalf or otherwise to defendants.

As a fourth separate and distinct defense defendants allege as follows:

I.

Defendants reiterate and incorporate all of the allegations contained in paragraphs I, II, III, IV and V of defendants' first defense with the same force and effect as if fully set forth herein.

II.

Answering paragraphs VII, VIII, IX, X, XI and XII, defendants deny generally and specifically each and every allegation therein contained except as hereinafter specifically admitted, and in that connection defendants allege the true facts to be as follows: That on or about February 13, 1934, plaintiff and defendants entered into negotiations with reference to the purchase by defendants of all aspara-

gus to be shipped from the Golden State Asparagus Company up to and including April 10, 1934. That as a result of said negotiations plaintiff and [10] defendants agreed to enter into a written contract of sale of said asparagus by plaintiff to defendants. That at the time plaintiff and defendants met for the purpose of drawing said written contract, plaintiff and defendants were unable to agree upon the terms to be set forth in said written contract. That as a result of being unable to agree upon the terms to be contained in said written contract, plaintiff and defendants agreed to abandon further negotiations for the sale of said asparagus by plaintiff to defendants.

As a fifth separate and distinct defense defendants allege as follows:

I.

Defendants reiterate and incorporate all of the allegations contained in paragraphs I, II, III, IV and V of defendants' first defense with the same force and effect as if fully set forth herein.

II.

Answering paragraphs VII, VIII, IX, X, XI and XII, defendants deny generally and specifically each and every material allegation therein contained except as hereinafter specifically admitted, and in that connection defendants allege the true facts to be as follows: That on or about February 14, 1934, defendants offered to purchase from plaintiff all bunch asparagus shipped from Golden State As-

paragus Company up to and including April 10, 1934, and defendants offered to arrange a guarantee of payment therefor. That said offer of defendants [11] was never accepted by plaintiff.

WHEREFORE, defendants pray that plaintiff take nothing by way of his complaint, and that defendants have judgment for costs incurred herein.

ERNEST J. TORREGANO
TORREGANO & STARK
Attorneys for Defendants [12]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

ERNEST J. TORREGANO, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendants named and described in the foregoing answer; that he knows the contents thereof and hereby makes solemn oath that the statements therein contained are true according to his best knowledge, information and belief.

That the reason why the verification to said answer is not made by the defendants or either of them is because said defendants do not reside within the jurisdiction of the above-entitled court, nor have any office in the City and County of San Francisco. That affiant is duly authorized to make this verification for and on behalf of said defendants.

ERNEST J. TORREGANO

Subscribed and sworn to before me this 20th day of February, 1935.

[Seal] CHARLES E. REITH

Notary Public in and for the City and County of San Francisco, State of California. [13]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19830-L.

GEORGE N. EDWARDS, as Receiver in Equity of Golden State Asparagus Company, a corporation,

Plaintiff,

vs.

HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN, JOHN DOE and RICHARD ROE, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, and H. ROTHSTEIN & SON, a copartnership,

Defendants.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial on the 23rd day of October, 1935, being a day in the July 1935 Term of said Court, before the Court and a Jury of twelve men duly impaneled and sworn to try the issues joined herein; Martin J. Dinkel-

spiel and David K. Lener, Esquires, appearing as attorneys for plaintiff, and Ernest J. Torregano and M. C. Symonds, Esquires, appearing as attorneys for defendants, and the trial having been proceeded with on the 24th, 25th, 29th, 30th and 31st days of October and 1st day of November, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the Jury, find in favor of the Plaintiff and asses the damage against the Defendants in the sum of seven thousand five hundred four dollars and two cents. ($7504.02/100) Dollars. Edward H. Clark, Jr., Foreman,", and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

NOW, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that George N. Edwards, as Receiver in Equity of Golden State Asparagus Company, a corporation, plaintiff, do have and recover of and from Henry Rothstein, M. H. Rothstein, I. Rothstein, John Doe and Richard Roe, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, and H. Rothstein & Son, a copartnership, defendants, together with his costs herein expended taxed at $58.35.

Judgment entered this 1st day of November, 1935.

WALTER B. MALING,
Clerk. [14]

[Endorsed]: Filed Dec. 11, 1936.

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on regularly for trial before the Honorable Harold Louderback, Judge of the District Court of the United States for the Northern District of California, sitting with a jury, on the 23rd day of October, 1935, Messrs. Dinkelspiel & Dinkelspiel and David K. Lener appearing as counsel for the plaintiffs, and Messrs. Torregano & Stark and M. C. Symonds appearing as counsel for the defendants Henry Rothstein, M. H. Rothstein, I. Rothstein, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, and H. Rothstein & Son, a copartnership; that the following proceedings were had, orders and exceptions hereinafter appearing, had and taken therein, the following be- [15] ing the testimony and evidence offered or introduced on the trial of this cause, to-wit:

(After impaneling of the jury).

Thereupon counsel for the defendants requested leave of the court to amend the answer of the de-

fendants on file herein to insert therein the word "bunch" after the word "all" in line 26, page 5, of said answer, which request was granted.

Counsel for the plaintiff thereupon offered in evidence a certified copy of the order of the above entitled court, dated September 5, 1930, in the matter of "American Can Company, a corporation, plaintiff, vs. Golden State Asparagus Company, a corporation, defendant," No. 2683-L, in equity, amongst the records of the above entitled court, appointing George N. Edwards as receiver of the Golden State Asparagus Company, a corporation, which certified copy was received in evidence and marked Plaintiff's Exhibit No. 1. Said order authorized the receiver to take possession and control of all of the property, assets and effects of the Golden State Asparagus Company and to do all and any things and enter into all and any agreements as may be deemed by the receiver necessary or advisable to preserve the property or assets.

The receiver was further authorized and empowered to institute, prosecute or defend or intervene in or become party to any such proceedings at law or in equity, including ancillary proceedings, as may, in his judgment, be necessary and proper for the protection and preservation of the assets of the Golden State Asparagus Company and also to collect, settle or otherwise dispose of any and all suits, actions or proceedings then pending in any court by or against the said Golden State Asparagus Company as in the judgment of said receiver may

seem [16] advisable or proper for the protection of its assets; to settle with, compromise, collect from or make allowance to its debtors; to enter into such arrangements, compositions, extensions or otherwise with its debtors as the receiver may deem advisable; and generally said receiver was authorized to do all acts, enter into any agreement and acts, adopt and approve any or all contracts as may be deemed necessary or advisable for the protection and preservation of the assets of the Golden State Asparagus Company. The receiver was given leave to apply for such further and other orders as may to him from time to time seem advisable and necessary in the administration of the estate.

Testimony of GEORGE N. EDWARDS as Receiver in Equity of GOLDEN STATE ASPARAGUS COMPANY, a Corporation, in his own behalf.

GEORGE N. EDWARDS,

as receiver in equity of Golden State Asparagus Company, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination

By MARTIN J. DINKELSPIEL:

The WITNESS: That in the months of January and February, 1934, and up to the present time he was receiver of the Golden State Asparagus Company, whose principal business is that of farming; that its lands are located in Sacramento County on Sherman Island, Brannan Island and Andrus Island. That in the month of February, 1934, about

(Testimony of George N. Edwards.)

six hundred acres of this [17] land was under cultivation in asparagus. That he had a meeting with M. H. Rothstein about the 10th day of February, 1934, at Isleton, California, which is on the Sacramento River on Andrus Island; that Ben Krasnow was present; that Krasnow was acting as representative for Mr. Rothstein on the Coast; that a discussion was had at said meeting concerning the sale of asparagus.

Mr. DINKELSPIEL: Will you relate as closely as you can what was said by Mr. Rothstein, by Mr. Krasnow and by yourself in connection with the sale and purchase by Mr. Rothstein's firm of the asparagus purchased by the Golden State Asparagus Company.

Mr. TORREGANO: Objection.

(Discussion)

The COURT: Overruled.

Mr. TORREGANO: Exception.

The WITNESS: At the request of Mr. Krasnow he met Mr. Rothstein by himself at Isleton about February 10, 1934. Mr. Rothstein said he wished to purchase his asparagus. He told Rothstein that he was not particularly interested in selling at that time because he had about completed arrangements for shipping it, and Rothstein remarked that he wanted the asparagus and generally got whatever he wanted. He told Rothstein that if he was willing to meet his terms he could get it all right. They discussed the general details of the shipments, the asparagus to be picked and how it was to be shipped.

(Testimony of George N. Edwards.)

Everything was satisfactory as to what type and grade of asparagus was to be shipped, how it was picked and loaded on the cars, who was to pack it, etc. Rothstein said he was satisfied with this arrangement. He asked Rothstein $2.00 a crate F.O.B. cars Isleton. Rothstein wanted a few days [18] to consider that factor. Rothstein said he was going to Seattle, Washington, and he gave Rothstein forty-eight hours in which to accept or decline the price, and within that time Mr. Krasnow, his representative, telephoned and said they would accept all he had to ship between the first of the season to the 10th of April, 1934, at that price. That at the conversation at Isleton he told Mr. Rothstein that if he sold him the asparagus they would have to give a satisfactory bank guarantee to assure payment would be made for all of the asparagus that was shipped upon delivery of the documents to them or their representative, which Rothstein said would be done. He told Rothstein he was acting as receiver and could not take any responsibility on that score. Whatever asparagus was shipped he had to make arrangements for to be paid. That at this conversation just bunch asparagus was to be shipped. That he had been engaged in farming operations, and in particular in connection with the raising and planting and growing of asparagus about twenty years. That in selling the term "bunch asparagus" is used and that it was a common term in the market during twenty years he had been operating. Bunch asparagus as used on the market is asparagus

(Testimony of George N. Edwards.)

with spears of fairly tight heads and a certain amount of length of greenness on the stalk supposed to be about eight or nine inches and green on the stalk and this is put in bunches with a press and tied with a ribbon. There is a small size and crooked spears that won't go in bunches and is not shipped east. Rothstein said he expected to ship the asparagus east.

Krasnow telephoned and told him that Rothstein had wired him that he would accept his offer for the asparagus and pay the price asked and would make satisfactory bank arrangements. [19] Krasnow asked him to wire Rothstein in Seattle confirming the sale, which he did.

Whereupon, Mr. Dinkelspiel requested Mr. Torregano to produce the original telegram addressed to M. H. Rothstein, Washington Athletic Club, Seattle, Washington, dated February 12, 1934, signed Geo. N. Edwards, Receiver, Golden States Corp. Co., which telegram was produced.

Mr. TORREGANO: We admit the telegram was received.

Whereupon the telegram was offered and received in evidence as plaintiff's Exhibit No. 2, and read to the jury as follows:

Western Union Telegram addressed to M. H. Rothstein, Washington Athletic Club, Seattle, Washington, February 12, 1934:

> "Will confirm sale to H Rothstein and Son all asparagus shipped from Golden State Asparagus Co up to and including Apr 10 34 $2

(Testimony of George N. Edwards.)

per crate fob cars Isleton providing satisfactory bank guarantee is given immediately that all drafts against shipments will be paid wire answer 801 Jones Avenue Oakland

Geo N Edwards Receiver

Golden State Asp. Co."

The WITNESS: In answer he received a Western Union Telegram on or about February 13, 1934.

Mr. DINKELSPIEL: We will offer this telegram, dated February 13, 1934, addressed to Golden State Corp. Co., 801 Jones Avenue, Oakland, California, signed M. H. Rothstein, from Seattle, Washington, in evidence as Plaintiff's Number 3.

Mr. TORREGANO: We object to that, if the Court please, on [20] the ground that it does not conform to the allegations set forth in the complaint.

The COURT: You are not objecting on the ground that this is not the original telegram?

Mr. TORREGANO: No, your Honor.

The COURT: Or it wasn't received?

Mr. TORREGANO: No.

The COURT: By the receiver and sent by the sender.

Mr. TORREGANO: We are not objecting there.

The COURT: But only on the ground you have just specified?

Mr. TORREGANO: Yes.

The COURT: The objection will be overruled, and it will be received as Plaintiff's Exhibit Number 3.

(Testimony of George N. Edwards.)

Mr. TORREGANO: Exception.

Mr. DINKELSPIEL: This is a telegram on a Western Union form, dated February 13, 1934, Seattle, Washington, addressed to the Golden State Asparagus Co., 801 Jones Avenue, Oakland, California. (Reading)

PLAINTIFF'S EXHIBIT No. 3.

"Answering will arrange guarantee payments all bunch asparagus price mentioned expect return San Francisco last this week or first next week don't worry when we make deal with you will go through with same can draw up contract my arrival meantime figuring deal confirmed

M. H. ROTHSTEIN"

The attention of the witness was thereupon called to a telegram from Ben Krasnow, dated February 19, 1934. The witness identified the telegram as having been received by him from Krasnow; thereupon the telegram was offered in evidence by plaintiff, received and marked

PLAINTIFF'S EXHIBIT No. 4. [21]

"G. N. Edwards,
Care Attorneys Dinkelspiel and Dinkelspiel
Pacific National Bank Building
San Francisco, California

We missed five fifteen train leaving on seven twenty train this morning will arrive at attorneys office eleven oclock

BEN KRASNOW."

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: Q. After the receipt of the wire of February 13, 1934, from Mr. Rothstein, did you believe as far as you were concerned you were bound under that obligation to deliver your asparagus to Mr. Rothstein on his furnishing you with a satisfactory guarantee.

The WITNESS: I did.

Mr. TORREGANO: Just a minute. I object——

Mr. DINKELSPIEL: I will stipulate the answer may go out.

The COURT: Probably the best way to do is to consider the objection made prior to the answer and see whether it will be stricken out after hearing the objection.

Mr. TORREGANO: We object to the question on the ground that it calls for the conclusion and opinion of the witness and is something for the Court and jury.

The COURT: There is no harm in hearing either one of them state he thought he made a contract or not. In other words, that doesn't pass upon the legality of a contract, but his attitude in connection with the testimony he is giving. I see no objection to that, because it is his personal attitude. I will allow it to stay in the record.

The WITNESS: That he met Rothstein and Krasnow at Dinkelspiel's office on the 19th of February, 1934. Mr. Martin Dinkelspiel was present. Rothstein said "what are we here for." He told

(Testimony of George N. Edwards.)

Rothstein he wanted to arrange for the bank guarantee. [22] Dinkelspiel asked how much was involved and he estimated about twenty thousand crates which would involve $40,000. Dinkelspiel suggested Rothstein furnish a bank irrevocable letter of credit for $40,000 and Rothstein objected strenuously. Rothstein said "my bank will think I am crazy. We buy millions of dollars worth of goods out here every year and don't put up any guarantee." He told Rothstein that was part of their arrangement and Rothstein said he would arrange it for him. Then Mr. Dinkelspiel said if he did not want to put up a letter of credit, but if his reputable bank in Philadelphia would guarantee the payments of the drafts as we presented the documents that would be satisfactory, but Rothstein would not agree to that, said he would not make any such arrangement, that they had been buying goods all over the country and never made this arrangement.

That during the entire conversation Rothstein refused to make any satisfactory financing guarantee. Since that day Rothstein has not offered a satisfactory bank guarantee, that Rothstein never made or offered any financing guarantee except the ordinary credit of his company; that as a result of the refusal of Rothstein and the firm of H. Rothstein & Son to furnish the guarantee or bank guarantee no asparagus was shipped them during the year 1934. During the season of 1934, up to April 10th he shipped 15,161 crates of bunch asparagus.

(Testimony of George N. Edwards.)

The total price received F.O.B. Isleton was $22,-547.85. If the asparagus had been sold at $2.00 a crate $30,322.00 would have been received. The difference between $22,547.85 and $30,322.00 is the amount claimed as damages suffered.

Whereupon plaintiff rested.

Mr. TORREGANO: If your Honor please, befor proceeding [23] I again desire to move to strike out all of the witness' testimony in regard to the asparagus which was being sold, the method of payment and to whom sold and by whom sold, upon the ground that those two contracts, or those two telegrams are the best evidence, and that those two telegrams cannot be supplemented by any parole evidence which would tend to incorporate therein any of the essential terms of those two telegrams.

The COURT: I think you had better make all the motions you wish. First, you are making a motion to strike as I understand it.

Mr. TORREGANO: To strike out all of the witness' testimony in regard to those two contracts and the terms contained therein upon the ground that those telegrams contain all of the writings passing between the two parties, the plaintiff on one side and the defendants on the other side. At this time, if your Honor please, to substantiate that motion——

The COURT: Is there any other motion you care to make? Let us have all the motions together.

Mr. TORREGANO: Then, your Honor, the plaintiff having rested, I move the jury be instructed to render a verdict in favor of the defendant.

The COURT: In other words, you are asking for a directed verdict at this time?

Mr. TORREGANO: Yes, on the ground that it appears that the plaintiff has not sustained the allegations in his complaint to the effect that the defendant and plaintiff have entered into a contract which calls for enforcement by this Court—that the evidence solely discloses they had some preliminary negotiations—that such contract was not entered into. [24]

Whereupon prior to argument upon the motions made by counsel for the defendants Mr. Dinkelspiel requested permission of the court to reopen plaintiff's case by recalling Mr. Edwards, which request was granted.

GEORGE N. EDWARDS
(Recalled)

Mr. DINKELSPIEL: Q. Mr. Edwards, directing your attention to the conversation testified to this morning at Isleton at that time between yourself and Mr. Rothstein, Mr. Krasnow being present, about the 10th of February, 1934, was anything said by you or Mr. Rothstein or both of you as to the type or kind of asparagus that was to be the subject matter of this sale?

(Testimony of George N. Edwards.)

Mr. TORREGANO: I will object, of your Honor please, on the ground it is incompetent, irrelevant and immaterial; that the writing introduced in evidence is the best evidence of the final consummation of any negotiations or conversation.

The COURT: Objection overruled.

Mr. TORREGANO: Exception.

The WITNESS: He told Rothstein that he would ship the same quality of asparagus that was shipped to Rothstein through H. P. Garin & Co. in 1931 and 2. Rothstein said that was the quality they wanted; that the kind of asparagus shipped through Garin was bunched asparagus,—shipping—so far as he knew, and no other type of asparagus was shipped to the eastern market. Rothstein said it was to be shipped to the eastern market—Atlantic Seaboard.

Mr. DINKELSPIEL: Q. Is there any difference between shipping asparagus and bunch asparagus?

Mr. TORREGANO: We object to that, if your Honor please, on the ground it calls for the conclusion and opinion of the [25] witness, and no foundation has been laid, and on the further ground it is incompetent, irrelevant and immaterial, and that any description of asparagus has been reduced to writing and the writing is the best evidence.

The COURT: Objection overruled.

Mr. TORREGANO: Exception.

The WITNESS: No, nothing was said in the conversation about his communicating with Roth-

(Testimony of George N. Edwards.)

stein, except that Rothstein was to let him know whetheh he was willing to stand the price that he had offered the asparagus at.

Mr. DINKELSPIEL: If you had offered the price, why did you send him a telegram?

The WITNESS: Well, his agent asked me to confirm the transaction. The telegram was sent at the request of Krasnow. He told Rothstein that he wanted five cents a pound for the shipping asparagus—bunch asparagus—there is fifty—thirty pounds in a crate. That would be one-fifty a crate plus fifty cents for packing and just bunching it and loading it on board the cars, and supplying the crate. That is how he arrived at the price of two dollars a crate.

Mr. TORREGANO: I again renew my objection and move to strike out the answer on the ground it tends to vary the terms of a written contract sued on here, is incompetent, irrelevant and immaterial, and not the best evidence; that such agreement must be in writing pursuant to the laws of this state.

The COURT: Read the question, Mr. Reporter.

(Question read)

The COURT: The motion to strike will be denied.

Mr. TORREGANO: Exception.

The WITNESS: As far as he knew there is only bunch asparagus shipped along the Atlantic Seaboard, some of it gets into the Middle West occasionally.

(Testimony of George N. Edwards.)

Mr. TORREGANO: I will object, of your Honor please, on the ground it is incompetent, irrelevant and immaterial; that the writing introduced in evidence is the best evidence of the final consummation of any negotiations or conversation.

The COURT: Objection overruled.

Mr. TORREGANO: Exception.

The WITNESS: He told Rothstein that he would ship the same quality of asparagus that was shipped to Rothstein through H. P. Garin & Co. in 1931 and 2. Rothstein said that was the quality they wanted; that the kind of asparagus shipped through Garin was bunched asparagus,—shipping—so far as he knew, and no other type of asparagus was shipped to the eastern market. Rothstein said it was to be shipped to the eastern market—Atlantic Seaboard.

Mr. DINKELSPIEL: Q. Is there any difference between shipping asparagus and bunch asparagus?

Mr. TORREGANO: We object to that, if your Honor please, on the ground it calls for the conclusion and opinion of the [25] witness, and no foundation has been laid, and on the further ground it is incompetent, irrelevant and immaterial, and that any description of asparagus has been reduced to writing and the writing is the best evidence.

The COURT: Objection overruled.

Mr. TORREGANO: Exception.

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(Testimony of George N. Edwards.)

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The WITNESS: As far as he knew there is only bunch asparagus shipped along the Atlantic Seaboard, some of it gets into the Middle West occasionally.

(Testimony of George N. Edwards.)

Mr. TORREGANO: I move to strike it out as incompetent, [26] irrelevant and immaterial, and that it is not binding on the defendants herein, the nature—— [27]

The COURT: Motion to strike will be denied.

Mr. TORREGANO: Exception.

Mr. DINKELSPIEL: You recall testifying to a conversation that took place in my office on the 19th of February, 1934, in which Mr. Rothstein, Mr. Krasnow, myself, and yourself were present. Was any reference in the conversation at that time had by either you or Mr. Krasnow in connection with bunch asparagus?

Mr. TORREGANO: I object on the ground that the contract is the best evidence.

The COURT: I don't recall whether that is supposed to be——

Mr. DINKELSPIEL: It was subsequent to the contract, your Honor, and the purpose is to show at that time the parties still had understood the terms that was the subject matter of the contract. In other words, a subsequent ratification of the supposedly misunderstood term is as good as a prior complete understanding.

The COURT: You take it as a ratification?

Mr. DINKELSPIEL: Yes, your Honor.

Mr. TORREGANO: I do not agree to that.

The COURT: I don't know what was said. I will allow the question.

Mr. TORREGANO: Exception.

The WITNESS: Yes.

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: Will you state just what was said at that time?

Mr. TORREGANO: We object to that on the ground it calls for the conclusion and opinion of the witness; secondly on the ground that any conversation or statement made at that time is supplemental to the written contract sued on here. [28]

The COURT: I think we have a right to have the exact language if he remembers it, and if he can't give it, give it in substance. I will sustain the objection as to the form.

Mr. DINKELSPIEL: I will reframe the question and ask you to state, if you can, just exactly what was said in that conversation by Mr. Rothstein, yourself or anyone else in that meeting.

Mr. TORREGANO: I object to that on the ground the contract is the best evidence.

The COURT: Objection to the reception of the testimony overruled.

Mr. TORREGANO: Exception.

The WITNESS: Mr. Dinkelspiel asked how many crates of asparagus he would have and he told him probably twenty-three or twenty-four thousand crates, but there would be only about twenty thousand of bunch asparagus. Rothstein said he would be interested simply in the bunch pack.

Loose pack asparagus is not the type referred to in the Garin contract. The conversation with Rothstein at Isleton was with reference to only bunch asparagus.

(Testimony of George N. Edwards.)

Cross Examination

(By Mr. Torregano)

The WITNESS: He displayed the two telegrams (Plaintiff's Exhibits 2 and 3) to Dinkelspiel & Dinkelspiel, his attorneys, and instructed them to draw up a contract and submit it to Rothstein for his signature. Dinkelspiel told him he drew up a contract, he does not recall whether such a contract was exhibited to him and Rothstein in Dinkelspiel's office. [29]

Mr. TORREGANO: I now call for the production of the contract.

Mr. DINKELSPIEL: I have not got it, because Mr. Rothstein walked out before any contract could be submitted.

The WITNESS: He does not recall whether there was more than one contract drawn up by Dinkelspiel based on this telegram. They never really got to that point because Rothstein refused to put up the guaranty and there was no use of going any further. He does not know whether Dinkelspiel submitted it to Rothstein. He gave Mr. Dinkelspiel the two telegrams and suggested he draw up a contract in conformity with the agreement embodied in the telegrams. He does not know whether Dinkelspiel actually drew it up or not. He does not believe he saw it. At the conference in Dinkelspiel's office he told Rothstein that he wanted a memorandum of this arrangement because he was receiver and wanted something in the record to show what the transaction was if any question

(Testimony of George N. Edwards.)

came up later on as to how much he received for the asparagus, etc., he wanted a memorandum or contract to show what the contract was. He told Dinkelspiel he wanted inserted in the contract exactly what arrangement they made at Isleton, the kind of asparagus to be shipped—bunched asparagus—how it was to be paid for and arrangements for guarantee of the payment.

The COURT: Do you believe the entire agreement between yourself and Mr. Rothstein was embodied in the contract?

The WITNESS: I do.

Mr. TORREGANO: I object as calling for a conclusion and opinion of the witness.

The WITNESS: I considered that we had made a sale.

The COURT: In other words, you considered the documents constituted an agreement between you two?

The WITNESS: Yes. [30]

The COURT: And when you gave it to Mr. Dinkelspiel did you suggest other terms besides those you thought you had agreed upon should be inserted in the agreement?

The WITNESS: No. [31]

Mr. TORREGANO: We move to strike that out on the ground it is incompetent, irrelevant and immaterial.

The COURT: I want to know just what the witness is testifying, and the motion to strike.

(Testimony of George N. Edwards.)

Mr. TORREGANO: I don't want the record confused.

The COURT: Will be denied.

Mr. TORREGANO: I will have to cite your Honor for——

The COURT: Let the record show the statement of counsel. The Court has only one object, not being a party to either side. It is immaterial to me whether your client wins or Mr. Dinkelspiel's client wins. Proceed.

The WITNESS: He simply told Dinkelspiel he had sold this asparagus to Rothstein in accordance with the arrangement made up at Isleton, and he simply wanted a memorandum of the agreement or an arrangement whereby payment would be guaranteed. All he wanted was to be sure that he would receive payment for the asparagus. It was the only object he had in mind. He said the only way they knew of to guarantee these payments was to furnish a letter of credit on a reputable bank in the East guaranteeing his bank that the documents would be honored upon presentation. At the time he had the conversation with Rothstein at Isleton he told him definitely in substance the same thing.

Mr. TORREGANO: What did you tell Mr. Rothstein at Isleton about how the deal was to be financed?

The WITNESS: I told Mr. Rothstein in Isleton that before the deal was made—that an agreement would have to be made that was satisfactory to my attorney assuring payments would be met as the goods were shipped.

(Testimony of George N. Edwards.)

He did not tell Rothstein at Isleton or in Dinkelspiel's office that he had to put up any deposit; he did not recall or was not sure [32] whether he used the words "bank guarantee" when he had his discussion with Rothstein at Isleton. As far as he recalled he had to be given a guarantee that the payments would be met during the entire shipping period, he told Rothstein he was looking for guarantees over and above the credit of his company.

At the conference in Dinkelspiel's office the subject of putting up a surety company bond was discussed and a telegram was dictated in Mr. Dinkelspiel's office in the morning and sent by Rothstein to his Philadelphia office.

Whereupon the following telegram was offered and received in evidence as

DEFENDANTS' EXHIBIT No. 1,

and read to the jury as follows:

"February 19, 1934.

M. Rothstein & Son,
Dock and Granite Streets,
Philadelphia, Pennsylvania.

Necessary place five thousand dollar faithful performance bond with Edwards receiver Golden State Asparagus Company Stop Notify your surety company have their San Francisco agent write bond and communicate with Martin Dinkelspiel Golden States attorney.

M. H. ROTHSTEIN."

(Testimony of George N. Edwards.)

The WITNESS: The subject matter of the surety bond was again discussed in the afternoon. Rothstein wanted to put up a $5,000 surety bond. He wanted a $10,000 bond and offered to pay the cost of the additional premium. In the morning he told Rothstein that to conform with his requirements of a satisfactory bank guarantee he wanted the bank to guarantee that drafts up to the amount of $40,000 would be paid as the goods were shipped and documents delivered to Mr. Rothstein's representative. Rothstein said he could not or would not do that. He offered him nothing after that and told Mr. Dinkelspiel as far as he was concerned that he wanted assurance that drafts would be paid and he told Rothstein that if there was any other arrangement that [33] could be made it was satisfactory as he was commencing to ship asparagus then and had cancelled the arrangements to ship the asparagus to other sources. [34]

Then they commenced to discuss the question about the bond and does not know or recall if they arrived at the amount of money. When it came to the question of the bond the question involved there was what the value of the asparagus being shipped every two or three days would amount to. He does not recall they ever agreed to any bond or an amount. He left the question of accepting the surety bond to Dinkelspiel. As far as he was concerned any arrangement that would guarantee the payment when the goods were shipped was all

(Testimony of George N. Edwards.)

he wanted. He understands that there are other classes of asparagus than bunch asparagus.

When he used the words "all asparagus" in his telegram (Plaintiff's Exhibit No. 2) he meant all shipping asparagus. Shipping asparagus and bunch asparagus is practically the same thing as far as the trade is concerned. Shipping asparagus and bunch asparagus is all the asparagus shipped back east. Possibly ten or fifteen per cent of the asparagus grown by the Golden State Asparagus Co. is culls. Shipping of bunch asparagus would involve a less number of crates than if all of the asparagus were shipped. In Dinkelspiel's office they talked about the bank guarantee to guarantee the payment of the shipments. The discussion in the afternoon was not very long, he thinks it was about the type of bond Dinkelspiel wanted to guarantee these payments and at the conclusion Rothstein said that if he was not willing to take his word for it the deal was off. He got in touch with Rothstein at Isleton through Krasnow, who got in touch with him, and that Krasnow told him Rothstein was out here from the East and that they would like to buy the asparagus and wanted to meet him up there on that particular day. At Isleton he discussed with Rothstein the specifications of the bunch asparagus, it was to be the same asparagus that had been shipped him through Garin and passed the State Department of Agriculture specifications. He does not know the federal specifications. [35]

(Testimony of George N. Edwards.)

The asparagus he intended to sell Rothstein he shipped East to various dealers, commission men. In order to make up carload shipments you generally work through jobbers. Roper and Company we call a jobber. He did not sell the merchandise to Roper, the asparagus was consigned through Roper, through H. Roper and Company, Commission Merchants. Roper makes a loading charge and a commission. The receiver, on the other end deducts the entire commission and expenses and pays Roper and sends him the account sales. He had the merchandise packed in different grades and sizes, part was bunched and part loose asparagus. Roper sold the asparagus through brokers or commission men. They are all the same. Right after Rothstein's deal fell through he went to Roper and told him he wanted to have the deal taken care of by him; before he saw Rothstein he had made all arrangements to ship the asparagus and when Rothstein agreed [36] to buy it he cancelled the arrangement. He thought he tried to sell the asparagus to other people.

In discussing the matter of posting the bank guarantee with Rothstein, he told him that he wanted the bank guarantee so that he would be *procted* as receiver of the estate. He has been a grower of asparagus for 20 years. He first grew asparagus in the vicinity of Suisun it was about 300 acres. The canning business is his business and he has dealt in asparagus all these years. Asparagus sold for canning purposes does not necessarily bring a less

(Testimony of George N. Edwards.)

amount than that sold for bunch asparagus. It depends on the market condition entirely. There is a custom and usage among the asparagus trade in regard to the entry into a contract for sale and purchase of asparagus.

It is not customary to write out a contract providing the manner of payment for the asparagus, grade of the asparagus, location, number of acres, approximate number of carloads to be shipped, manner of shipment, whether or not asparagus is free and clear of any lien and date of payment. He has not seen any contracts that contain those requirements, most of the business is done by wire. He has seen the expression "satisfactory bank guarantee" used in the trade.

A satisfactory bank guarantee can be arranged as follows:

A responsible bank in the east will wire out to his bank that they will honor all drafts against a particular party back there who is a customer up to a certain amount of money when the documents are presented. The amount to be shipped is estimated. We estimated shipping $40,000 worth of asparagus during the period covered in this sale and that is what we asked for. The $40,000 of asparagus was to be shipped from Brannan Island at Isleton. There was no other Island in addition to Brannan Island which was planted by the Receiver to asparagus belonging to the Golden State Asparagus Co. There was no asparagus in 1934 on [37]

(Testimony of George N. Edwards.)

Andrus Island, nor on Sherman Island. He is sure about that. Another way to meet the requirement of a satisfactory bank guarantee would be for the buyer of asparagus to furnish an irrevocable letter of credit to his bank permitting them to make payments as shipments and documents were turned over to them. Those are the only two ways he knows to give a satisfactory bank guarantee. He had not communicated to Rothstein that that was his understanding as to how a satisfactory bank guarantee could be accomplished. At the time he ascertained he would have to sell the asparagus to someone else than Rothstein he ascertained that he could get more at that particular time by shipping it than from the canneries.

At Isleton he told Rothstein he would have to commence shipping asparagus at any time and that if they entered into a contract Rothstein would pay him $2.00 a crate and he would give Rothstein the returns on the cars shipped. At the time the proposition was discussed at Isleton, the season was right on them, and he told Rothstein he may have to commence shipping asparagus any time, and Rothstein wanted a couple of days to consider the matter as to whether or not he would accept the price and he said if in the meantime Edwards had to ship any asparagus before the deal was completed to go ahead and ship it, and that early asparagus generally brings seven or eight cents a pound and that he would pay Edwards $2.00 a crate and that he would

(Testimony of George N. Edwards.)

give him whatever the returns were on those crates shipped prior to shipping to him.

Redirect Examination.

By Mr. DINKELSPIEL:

The WITNESS: Roper is purely a shipper. The culls are shipped through him to a local market. Within a short time after they met at Mr. Dinkelspiel's office Rothstein told him that he would not furnish a bank guarantee. At the meeting on the 19th day of February both kinds of guarantees were called to Rothstein's attention. Rothstein was asked if he had any other type of bank [38] guarantee to suggest; he did not suggest any bank guarantee. He refused to give any bank guarantee. After his refusal to furnish the bank guarantee Edwards told Mr. Dinkelspiel if he wouldn't put up the bank guarantee if there was any other arrangement that could be secured in payment of these shipments it would be satisfactory to him, as he had already started to ship asparagus. At the conference in Dinkelspiel's office he told Rothstein he had already started to ship asparagus and if there was any possible way in which he could be assured of payment for the shipments he would be satisfied. The green or bunch asparagus season begins about the middle of February ordinarily, and lasts until the first to the tenth day of April. The same amount of asparagus is not shipped every day. There are periods during the time between the 15th day of February,

(Testimony of George N. Edwards.)

to the 10th day of April, when larger or lesser quantities find their way to the market. The volume of shipment increases toward the latter end of it, and the main purpose in calling for a guarantee was to protect these large shipments. He thinks there is a law against culls being bunch packer. They usually are loose packed, dumped in shipping crates. Bunch packed are those tied up with small ribbons. As distinguished from the fresh market or green shipping asparagus period, the canning period ordinarily starts in California the 10th day of April. He at no time told Rothstein that he would accept $5000 surety bond as a satisfactory guaranty. [39] Rothstein at no time said he would give a $5,000 surety bond. Rothstein left Dinkelspiel's office about 12 o'clock and said he would be back at one-thirty. As he recalls they waited about 2 hours; it was between three and three-thirty when Rothstein returned. The afternoon conference lasted about 15 minutes. At the conference on the afternoon of February 19th Rothstein said he would not put up any security for the payment of the drafts, that he bought millions of dollars worth *or* produce all over the United States and did it largely over the telephone or by telegraph and if they were not willing to accept his credi*to* he would call the deal off. The terms "bunched grass" and "green shipping grass" as used by the trade are synonymous. Bunch asparagus is not less than three-eighths inches in diameter, nine inches long, six to seven inches of

(Testimony of George N. Edwards.)

green on the stalk, fairly close heads, no crooked or seeded heads or crooked spears or seeded heads, packed in crates. There might be a technical difference in opinion as to what is meant by "all asparagus." If there are any culls in the boxes they are segregated. You pay for bunch asparagus. The cullls are used locally. You can't afford to ship them, the value is so low.

Recross Examination.

By Mr. TORREGANO:

The WITNESS: In some instances during the time he has been receiver he has obtained the order of the court approving the sale of asparagus. He has had this property since starting with the harvest of thirty-one and he has sold it every year. He sells the cannery asparagus which involves twice as much money as this every year without the approval of the court, and in only one instance he secured the approval of the court and this is where the crop mortgage was involved and he had to get a court order to make the mortgage good. [40] He did not state to Rothstein that he did not want a surety company bond at the time the telegram was dictated (Defendants' Exhibit No. 1). He is quite sure he heard the telegram dictated in his presence. He does not know when the telegram was sent. There was no telegram sent during the fifteen minute conference in the afternoon. At the conference in Dinkelspiel's office Rothstein declined to put up a bank

(Testimony of George N. Edwards.)

guarantee. He said he would not go on with the deal unless he took his credit. Rothstein said at that time that he would not put up a surety bond. In the course of the conference Rothstein said that as drafts would be presented against the shipments his bank would honor the drafts. He told Rothstein that what he was after was protection on the end of a shipment and he wanted a guarantee put up so he wouldn't run out if the market broke, and that is what he wanted it for. He told Rothstein that if he was doing business with a reliable bank and his bank would guarantee that Rothstein's draft would be paid alright, or if he didn't want to do that, if he would put up an irrevocable letter of credit to be used as shipments were made that would be satisfactory. At Isleton he told Rothstein that the only asparagus he was growing was on Brannan Island. He told Rothstein he wanted some guarantee besides Rothstein's word that the drafts would be paid as presented. After Rothstein refused to put up the kind of security he wanted Rothstein said he would wire his office to see whether he could get a bond or not, that all he would put up was a $5,000 bond. He used the words "all asparagus" in the offer in his telegram (Plaintiff's Exhibit No. 2) because at the time he previously sold asparagus to Garin, Rothstein, they bought the asparagus delivered to their packing shed at a certain price per pound and they packed it out themselves and did [41] the bunching and grading themselves, and in discuss-

(Testimony of George N. Edwards.)

ing the present transaction at Isleton it was understood he was going to do the bunching and packing himself and it would be the same quality shipped Rothstein before under the Garin contract. In asking Dinkelspiel to draw up a contract he told him that was the understanding with Rothstein and that was to be inserted in the contract Rothstein was to sign. When Rothstein left Dinkelspiel's office in the morning he sent this telegram to see whether he could get a bond or not and Mr. Dinkelspiel thought it was a compromise measure, and that something might be worked out with a letter of credit. As he recalled he telephoned to his secretary at his hotel or to somebody to send the wire. He was going to come back after lunch at 1:30 and let him know whether he could get the bond, and when Rothstein came back he said he decided not to go ahead with the deal; that they were not going to put up anything; that unless Edwards was willing to take their credit the deal was off. He does not recall ever exhibiting the form of the written contract to Rothstein; he thinks he requested Dinkelspiel to draw up a contract in accordance with the two telegrams (plaintiff's exhibits 2 and 3). The telegram simply used trade words. He told Dinkelspiel he wanted a contract drawn up covering the points mentioned in the two telegrams and did not give Dinkelspiel any other instructions.

Mr. TORREGANO: But you did not disclose to him that you had any discussion with Mr. Rothstein

(Testimony of George N. Edwards.)

with regard to any other points involved in the transaction that what was in the telegram? Is that correct?

The WITNESS: Yes. His third report and account as receiver filed on September 21, 1934, does not mention having entered into a contract with Rothstein. He had no discussion with Rothstein as to the different lengths of stalks in the bunch asparagus. [42]

Redirect Examination

By Mr. DINKELSPIEL:

The WITNESS: Price of asparagus is not dependent on the grades whether they are mammoth or colossal, or other different classifications that go to make an asparagus crop. He would like to elaborate a bit on that answer to the effect that when a price is made by a commission merchant for an entire crop there is no differentiation as a rule between the sizes, in other words, as asparagus gets older it gets smaller, there is less of the larger size, and a crop that would contain a certain proportion of the large size might be bought for four cents a pound whereas a crop that contained a large percentage of the smaller size would be bought for three cents a pound. Krasnow was familiar with and had seen the acreage and plants about ten days prior to the time Rothstein came out to the coast, prior to the time he met him in Isleton, which was about

(Testimony of George N. Edwards.)
the tenth of February. Krasnow had seen this acreage about February 1st. He saw it flooded, which meant that he would have unusually early asparagus. Krasnow had seen the place in thirty-two, thirty-three and nineteen thirty four. In fact in thirty one and thirty two he was the man who packed the asparagus shipped to Garin.

Whereupon plaintiff rested.

Thereupon the court denied the motion of defendants to strike out all the witness' testimony in regard to the two telegrams (Plaintiff's exhibits 2 and 3). The motion was made upon the ground that the telegrams contained all the writings passing between the two parties, and also denied the motion of the defendants that the jury be instructed to render a verdict in favor of the defendants. The motion was made upon the ground that it appeared that the plaintiff had not sustained the allegations in his complaint to the effect that the defendants and plaintiff entered into a contract; that the evidence solely [43] disclosed that the parties merely had some preliminary negotiations.

Testimony of

H. P. GARIN

H. P. Garin, called as a witness for the defendants, having first been duly sworn, testified as follows:

(Testimony of H. P. Garin.)

Direct Examination

By Mr. TORREGANO:

The WITNESS: That for about thirty years he has been engaged in the produce business, farming and shipping vegetables, and is familiar with the custom and usage generally prevailing in the asparagus industry. In a contract between a grower and buyer of asparagus, according to trade custom and usage, the provisions customarily required to be inserted in the contract are the grade, classification and quality in either white or green asparagus, U. S. 1, or according to State inspection, the manner of payment, if you are shipping F.O.B. you draw a draft on the buyer. If you are afraid he won't pay you you ask him for a bank guarantee; that in that case you furnish him the inspection and bill of lading or shipping order and ask him to give you —wire him for the guarantee for the amount of your draft and take that bill of lading or shipping order and your inspection, over to the bank and get your money, or if you don't do it that way you just ship it on open draft if you know the man and he pays the draft when it gets there, or in some cases airmails a check for it, the location where the asparagus is grown, the approximate number of acres, the method of shipment, [44] provisions as to pooled cars, whether the asparagus is being sold free and clear of encumbrances and limiting the dates of shipment. Every once in a while they ask

(Testimony of H. P. Garin.)

in a contract that a "satisfactory bank guarantee" be put up. He has entered into contracts in which that was one of the conditions appertaining to the sale.

The COURT: Just say what the term means without going into other details not being asked for. What do you understand that where that appears in a contract?

The WITNESS: A sufficient guarantee — it would mean——

The COURT: Satisfactory guarantee?

The WITNESS: Yes.

The COURT: Bank guarantee?

The WITNESS: A man puts up either certain guarantee that—with a bank to fulfill his contract and then makes a draft on him for every—that is as a deposit like, you see. That is the way we do it. We make them put up a deposit, a guarantee or bond or something we know in case——

The COURT: You call them all bank guarantees?

The WITNESS: It is——

The COURT: Just say yes or no. Do you call them all bank guarantees?

The WITNESS: It is the same—a letter of credit.

The COURT: That is, what you call a bank guarantee where they put up a bond?

The WITNESS: Bond—they put up a bond with a bank and the bank sometimes guarantees it.

(Testimony of H. P. Garin.)

The COURT: The bank assumes, then, the responsibility that drafts will be drawn against said account, isn't that correct?

The WITNESS: Yes.

The COURT: Your speaking of the bond merely goes to the fact that banks might execute that for its own protection but does [45] the bank actually guarantee the drafts will be honored?

The WITNESS: That is true, but on a great many occasions a man puts up a bond and then you draw on him, the bond guarantees either the bank or us against—if he goes back on the contract.

The COURT: If the bond ran to you and not the bank you wouldn't classify that as a bank guarantee would you?

The WITNESS: No, I wouldn't.

Mr. TORREGANO: But if the bond was put up for the performance of a contract and that in addition to the arrangements were made with the bank to take up each and every draft would that come under the term satisfactory bank guarantee?

The WITNESS: Yes. A satisfactory bank guarantee is where a man puts a certain guarantee with a bank to fulfill his contract and then makes a draft for every shipment, or where a letter of credit is given, or a bond guaranteeing either the seller or the bank if the buyer goes back on the contract. [46]

According to custom and usage in the asparagus trade there is a difference between the terms "all asparagus" and "all bunch asparagus." There is

(Testimony of H. P. Garin.)

a loose pack of asparagus, and a bunch pack, and six grades of bunch pack. The extra fancy, colossal, jumbo, extra fancy and fancy, and select and extra select, they come under bunch grass. He has known the firm of H. Rothstein & Son for some time and has dealt with them as an eastern representative for many years and is still dealing with them. He has dealt with them during this present year.

Cross Examination

By Mr. DINKELSPIEL:

The WITNESS: The grade of the asparagus is always specified in the contract. All contracts that the firm of H. P. Garin enter into specify whether they are buying bunch asparagus or not. In 1931 and 32 he purchased from Edwards, as receiver, both bunched and loose asparagus. Green merchantable shipping asparagus would be the same as bunch asparagus if it was up to grade. All their contracts with individual farmer-growers provide against liens, we would not use that in dealing with firms. The requirements against liens and encumbrances from the farmer-grower is our own requirement for our own protection. He has seen other contracts containing the provision because he has made his contracts exchanging other people's contracts, also cannery contracts; all of them did not have that provision.

Testimony of

WALTER S. MARKHAM

Walter P. Markham, called as a witness for the defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. TORREGANO:

The WITNESS: That for twenty years he has been in the shipping and brokerage business, distribution of vegetables. He [47] has resided in Salinas since May, 1934, and in California since June, 1929. He first became engaged in the business in Oklahoma as a salesman, credit manager, and assistant buyer, he was connected with H. P. Garin & Co. at San Francisco for five years. He was really Mr. Garin's right-hand man. Garin did not make any major purchases of asparagus, or any other commodity, without consulting him. Before he came to California he had contracts with growers of asparagus. He did not close any deals in California prior to coming to California. He bought lots of asparagus in California prior to coming to California. His usual practice of communicating with the growers was by telegraph. Occasionally by telephone. The growers would usually wire him. It was usually an exchange of wires. He purchased some produce for H. P. Garin & Co., mostly loaded cars. When he needed a carload he would contact a jobber or commission house, and fill in his order from their stock. He did not contact growers in that connection, and by reason of

(Testimony of Walter S. Markham.)

his experience is familiar with the trade custom and usage as it pertained to the asparagus industry.

In a contract entered into for the sale of asparagus, and according to trade custom and usage, the provisions customarily inserted are: the location of the commodity being sold, point of delivery, what packing shed is to be used, the grade, time and method of shipment and manner of payment. The dates of shipment are important because the price fluctuates, because of Eastern competition with California asparagus; Carolina, Georgia, New Jersey, and other producing districts interfere with the consumption. They come into competition with California grass at certain times so all contracts he has ever seen on asparagus specify the dates of shipment from and to including certain dates. The contract should contain the grade of asparagus because of the wide variation in packs and grades.

[48]

The term "satisfactory bank guarantee" is customarily used in preliminary negotiations for a sale in the asparagus business.

Mr. TORREGANO: Will you state as to whether or not the term "satisfactory bank guarantee" has a definite meaning amongst the custom and usage of the trade of asparagus as to how the bank guarantee payment is to be ultimately made?

Mr. DINKELSPIEL: Objection.

The COURT: Let's ask the question and be through with it, how is it understood in the trade when used in the preliminary negotiations—as meaning what?

(Testimony of Walter S. Markham.)

The WITNESS: That the—it is understood that the purchaser from that wording there that you have just referred to—satisfactory bank guarantee—that the purchaser is willing to make the proper or satisfactory method of payment to suit the seller. That's what I gather from it, Judge.

Mr. TORREGANO: When you say "what you gather"—is that the way the term is used as negotions go on between people that buy and sell asparagus? Is that the way the term "satisfactory bank guarantee" is used by people who buy and sell asparagus?

The WITNESS: Your Honor——

Mr. TORREGANO: Is that your answer?

The WITNESS: No, my answer is bank guarantee means one thing——

The COURT: I am only asking one thing and see how you can answer. You have testified here as I understand the record that the term "satisfactory bank guarantee" in connection with preliminary negotiations is a term that is used by people who are buying and selling asparagus.

The WITNESS: Yes, sir.

Mr. TERREGANO: When they use that term is it understood among the trade as representing a certain thought? It is, isn't it? [49]

The WITNESS: Yes.

Mr. TORREGANO: There is no difference of opinion on it?

The WITNESS: No.

Mr. TORREGANO: What does the trade, as you understand the custom, as you understand in

(Testimony of Walter S. Markham.)

the preliminary negotiation, understand this word to mean when used in connection with the purchase of asparagus?

The WITNESS: The purchaser will secure or give the seller a satisfactory bank guarantee.

Mr. TORREGANO: Of course, those are the words themselves?

The WITNESS: A satisfactory method of payment then.

Mr. TORREGANO: Satisfactory to who?

The WITNESS: To the seller and the buyer in the contract.

Mr. TORREGANO: Make a satisfactory——

The WITNESS: It must be satisfactory to both parties.

Mr. TORREGANO: You are beginning to argue. You are not supposed to be an authority on it. But you are being placed here to show what they would understand. If a man says he will give a satisfactory bank guarantee it means he will give one satisfactory to the person he guarantees to give it to—correct?

The WITNESS: Yes.

Mr. TORREGANO: And he leaves it open to interpret that to suit himself? Leave it to him.

The COURT: I am asking him the question, and not Mr. Torregano.

Mr. TORREGANO: But I am protecting my record.

The COURT: Object?

Mr. TORREGANO: Yes.

(Testimony of Walter S. Markham.)

The COURT: Overruled.

Mr. TORREGANO: I note an exception.

The WITNESS: The purchaser lays himself open to reasonable [50] qualifications to satisfy the buyer that the guarantee——

The COURT: The only limitations is what you term "reasonable limitations"?

The WITNESS: That is all, yes, sir.

The COURT: Proceed.

Mr. TORREGANO: Would a letter of credit be a reasonable limitation?

The WITNESS: Yes, sir.

Mr. TORREGANO: Would the deposit by the purchaser——

The WITNESS: On the contract——

The COURT: Wait a——

The WITNESS: There must be a meeting of minds Judge.

The COURT: You are not being asked about a contract, but what this term means when used preliminary. Once it is in a contract it has a different status. Then you have a point where you are not looking for the custom of the trade, but the legal responsibility. It is what the understanding would be in the trade, of such a trade, before they have actually consummated the contract.

The WITNESS: Yes.

The COURT: Have you answered fully as to that in your answer to me or do you wish to add further?

(Testimony of Walter S. Markham.)

The WITNESS: I don't want to take up any unnecessary time, but there are different methods of buying that I think have not been explained.

The COURT: The point is those terms don't mean any more than what you have said to people who negotiate with them without defining them any further do they?

The WITNESS: Yes, sir, they do.

All right. Then they do mean more than you said? You said "reasonable". Now what does it mean to everybody dealing in the trade? [51]

The WITNESS: A bank guarantee means——

Mr. TORREGANO: Go ahead—satisfactory bank guarantee?

The WITNESS: A bank guarantee means the transfer of monies or the guarantee of the purchaser's bank to the seller's bank the amount of the invoice covering that particular shipment. That is the meaning of a bank guarantee, and the method of handling it.

The COURT: Those are two methods understood under that expression, bank guarantee.

The WITNESS: Yes. If you want to ask any more——

The COURT: I am not asking any more. Proceed.

Mr. TORREGANO: Under the term "satisfactory bank guarantee" it is not required in the trade to furnish a bond in behalf of the grower or seller?

The WITNESS: Your Honor——

(Testimony of Walter S. Markham.)

Mr. TORREGANO: Is it required?

The WITNESS: I don't know what the seller is going to require.

Mr. TORREGANO: In the trade, though, may he require that?

The WITNESS: Yes, sir; the seller may require that a bond be put up to guarantee.

Mr. TORREGANO: In other words, under the customs of the trade, he would have a right to do it?

The WITNESS: A perfect right, yes.

Mr. TORREGANO: And under the trade custom and usage, may the buyer put up a bond and also arrange for his bank to meet the drafts for each car as they are shipped?

The WITNESS: Yes.

The COURT: He has gone at great length to show the custom in the trade. In other words, there is a custom in the trade?

The WITNESS: Yes. [52]

Mr. TORREGANO: And it is also a custom in the trade in meeting that term "satisfactory bank guarantee" by arranging for the deposit of a certain percentage of the purchase price in cash and also arrange with the bank to meet the drafts as they're presented?

The WITNESS: Yes.

The COURT: This all follows the use of the expression "providing a satisfactory bank guarantee", is that correct?

The WITNESS: Yes.

The COURT: In the trade?

(Testimony of Walter S. Markham.)

The WITNESS: Yes. Your Honor, just a minute. You asked me a while ago——

The COURT: Do you want to explain something you have already testified to?

The WITNESS: Yes.

The COURT: Well, if it's pertinent to your testimony, proceed.

The WITNESS: You asked me to make this method of payment as brief as possible and I put it in about eight or ten words there. Now, there are other methods.

The COURT: I said brief, but also said complete. I don't say by your brevity to leave out any thought.

The WITNESS: I did.

The COURT: Tell us what you left out.

The WITNESS: There is the bank guarantee for one—a letter of credit too. A deposit in a local bank or a bank close enough to satisfy the seller when an agent can give the seller a check for the shipment on receipt of the bill of lading and Federal inspection and invoice. One more——

The COURT: Go ahead.

The WITNESS: Or a bond to see that the contract is ful- [53] filled—that they carry out their agreement, see. Put it in escrow—a bond—to see that the purchaser fulfills his contract and against the documents as the shipments are made then draw a draft on each individual shipment. The purchaser's bank wires the seller's bank that they will honor the draft covering this shipment upon receipt of

(Testimony of Walter S. Markham.)

papers, car numbers and papers. Those are the four methods.

The COURT: You have testified that the seller could exact within reason any of these methods, is that correct?

The WITNESS: Yes.

The COURT: And the buyer then wouldn't have the discretion to offer any one of these unless the seller approved it? Is that your testimony? Or are you testifying the buyer has a right to offer any of those to the seller?

The WITNESS: The buyer to the seller.

The COURT: Just the reverse from what you said. It isn't the seller that can exact this, but the buyer who can elect to take any one of those methods under those terms?

The WITNESS: Yes.

Mr. TORREGANO: As I understand from your testimony, both the buyer and the seller must agree on the terms, is that correct?

The WITNESS: Yes.

Mr. TORREGANO: In the event that a percentage of the purchase price is required by the seller, what in your opinion according to the general custom and usage of the asparagus trade would that percentage be of the total amount involved?

The WITNESS: Ten per cent.

Mr. TORREGANO: In a contract involving say $35,000 or $40,000 for the sale of asparagus what amount of bond would you say the buyer would be required to put up in addition to making an ar-

(Testimony of Walter S. Markham.)

rangement with his bank to meet each individual draft as the car rolls, [54] under the trade custom, as applied to satisfactory bank guarantee?

Mr. DINKELSPIEL: I object to the question on the ground that no proper foundation has been laid.

(Discussion)

The COURT: I will allow the question.

Mr. DINKELSPIEL: Exception.

The WITNESS: It is customarily ten per cent.

The COURT: To clear up your testimony. After you had testified—first you probably erroneously testified from your statement that the seller has a right to exact certain things at his option, then on my pointing out you probably meant the buyer you said the buyer had a right to exact certain things. Now, on top of that, Mr. Torregano asked you a question as to whether it wouldn't have to be agreed between them subsequently and you said yes. Do you now testify that those terms mean nothing until they had agreed later which one they would follow, or do you mean the seller making a preliminary contract could give any one of those four methods?

Mr. TORREGANO: I object as compound.

The COURT: The point is if the witness understands.

Mr. TORREGANO: Exception.

The WITNESS: When you first put the question to me—brevity—and I didn't get the complete explanation of it, see, and it was a case as I said to condense it in as few words as possible. That's

(Testimony of Walter S. Markham.)

what you wanted me to do. The seller has a right to demand what he wants. The purchaser has a right to demand what he is going to pay—how he is going to do it.

The COURT: I am not talking about payments.

The WITNESS: We are talking about four methods.

The COURT: You have characterized your testimony by brevity. [55]

The COURT: When those terms are used do I understand that you thought there must be a subsequent understanding between the parties to make them effective—or according to the trade now—that the purchaser can elect to offer to the seller any one of those four methods that you specify?

The WITNESS: That's a very hard question to answer, your Honor.

The COURT: You can't answer it, is that it?

The WITNESS: Yes, I can.

The COURT: Answer it.

The WITNESS: Depending upon the anxiety of the buyer or purchaser who may do more than he would ordinarily in the manner of meeting the seller's terms—the anxiety of the seller may conform to the purchaser's idea and stretch a point as to how he will accept payment.

The COURT: I don't see that's an answer to the question. I am asking you something definite. The terms being used, and not asking anybody to make any concession at all—or anybody who urg-

(Testimony of Walter S. Markham.)

ently needs to make a contract. I am asking you when these terms are used in the preliminary agreement whether that is to be understood in the trade that the purchaser can offer subsequently to the seller any one of those four methods of financing to satisfy that expression in the trade, or do you feel that that would have to be subsequently embodied in a new arrangement between them before they could become effective—between the parties? Do you understand?

The WITNESS: Yes.

The COURT: Mr. Torregano asked you a question along that line; and I wanted to clear it up.

The WITNESS: Yes, sir, I understand. It is customary for the seller to designate how the payment—how the shipments shall be paid for. That is the custom. Does that answer your question?

The COURT: Well, I won't go into that. I am satisfied to let [56] the record stand.

Mr. TORREGANO: It doesn't answer me.

The WITNESS: I answered Judge——

Mr. TORREGANO: What the court wanted you to answer is this; in a contract or preliminary negotiations containing the term "satisfatcory bank guarantee" is that term so definite that nothing is required to be done between the buyer and seller to determine how the satisfactory bank guarantee shall be evidenced?

The WITNESS: No.

Mr. TORREGANO: That there is something further to be done, is that correct?

The WITNESS: Yes.

(Testimony of Walter S. Markham.)

Mr. TORREGANO: You say where there may be four different ways, usually used for the financing it is not done as yet and must be still subject to further negotiation? Is that your testimony?

The WITNESS: Every deal, Judge——

The COURT: Answer the question?

The WITNESS: Yes.

Mr. TORREGANO: And you were about to explain that answer. Will you please explain the answer.

The COURT: I don't think it needs explaining.

Mr. TORREGANO: But you desire to explain the answer "yes" that you gave. If you have any explanation I want you to proceed.

The WITNESS: Yes, my explanation is, every deal is a separate transaction, and the terms or method of payment is usually determined by that particular deal and all in a contract or on a standard confirmation of sale, which is necessary in this line of business, and that is the reason I answered as I did. [57]

A contract with the phrase in it "all bunch asparagus would not meet the requirements of the custom and usage of the trade so as to specify the grade and kind of asparagus. The term "bunch asparagus" according to trade custom and usage in the trade means generally asparagus of sufficient quality to justify bunching, packed in containers with certain sized dimensions, with minimums as to size. It is a very broad statement. The term

(Testimony of Walter S. Markham.)

"all asparagus" according to custom and usage in the trade means everything produced, culls, crooks, seeded heads, anything that could be cannery asparagus or loose asparagus or bunch asparagus. There was a market for bunch asparagus in New York between February 13, 1934 and April 30, 1934, and a market for bunch asparagus in Philadelphia between February 21, 1934, to April 29, 1934.

Cross Examination

By Mr. DINKELSPIEL:

The WITNESS: Shipping asparagus is asparagus suitable for eastern shipment. He has never seen a standard contract form in the asparagus trade that growers and buyers sign. His experience is largely limited to contracts that are written by H. P. Garin & Co., they are taken from contracts of other shippers, or other growers, they kind of rehash them and take what they think is best. They are purely H. P. Garin contracts. He knows H. P. Garin & Co. had a contract in 1931 and 1932 with George N. Edwards. That contract had some special features due to the nature of it, being a receivership, there was some special cash settlement in it if he remembers correctly. That asparagus was purchased on a pound basis packed by H. P. Garin & Co. and Rothstein—that is under their supervision at Isleton. The Garin contract of 1931-2 with the plaintiff called for all straight suitable asparagus without broken tips, suitable for shipping. It was not bunch asparagus. Bunch asparagus is

(Testimony of Walter S. Markham.)

asparagus with straight spears, good caps and not [58] bruised or spread beyond certain degree. The degree is determined by the shed foreman or the representative of the purchaser or if in cases where grade stipulations are required, such as U. S. One Grade, there is a tolerance or percent that will be allowed. Then the asparagus must be three-eighths of an inch in diameter, at a minimum of three-eighths of an inch. That any larger constitutes bunch asparagus tied in bunches with ribbons for shipping East. There would still be some good grades that could be shipped loose. Some culls are shipped loose, depending on the market. The words "field run" means everything in the field. You subtract the bunch pack in the field and everything left is culls. He has done business with H. Rothstein & Son. From his experience the price of asparagus usually drops in the Eastern market along the latter part of March, and the forepart of April, as compared to February. He has done business with Rothstein & Son since he has been in Salinas. Since he sold out he hasn't done any business with Rothstein & Son because they have their own representative in Salinas. He did business with Rothstein & Son as late as January of this year. He is familiar with what is commonly known as "the green asparagus season". That is, from the time grass is first cut in the early part of the year, usually in February until along in April, and then it is commonly termed the "canning grass". As a general rule more of it is moved out of California

(Testimony of Walter S. Markham.)

during the latter part of that period, the latter part is the time when the peak shipments are reached, and this is the time when California grass starts to come into competition with Eastern asparagus. From his experience the price of asparagus usually drops in the Eastern market along the latter part of March, and the forepart of April, as compared to February. He *have* never personally purchased an entire crop of asparagus for shipment East from any grower in the Sacramento delta, for any firm that he was working with. [59]

Testimony of

JAMES C. HARLAN

James C. Harlan, called as a witness for the defendants, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. TORREGANO:

The WITNESS: That he is employed by the Department of Agriculture of the State of California.

Whereupon the witness produced a letter written to the Department of Agriculture by Messrs. Dinkelspiel & Dinkelspiel, dated April 26, 1934, which letter was offered and received in evidence and marked

(Testimony of James C. Harlan.)

DEFENDANTS' EXHIBIT NO. 2,

as follows:

"April 26, 1934

C. J. Carey, Esq.,
Chief of Division
Department of Agriculture,
Sacramento, California

My dear Carey:

Before filing any formal complaint in accordance with the data sent us in your letter of April 19th, the facts on which we might file a complaint are briefly as follows. We are giving them to you for the purpose of ascertaining whether or not they would come within the purview of the Department's jurisdiction.

On or about the 15th of February pursuant to certain conversations had between a client of ours, a California grower of asparagus, an eastern house through its local representative entered into a verbal understanding in regard to the purchase of the entire green asparagus crop up to April 10th of our client. A partner of this eastern firm was in the West at the time although not in California. Our client wired him to his then address setting forth the terms of the sale and providing that the buyer would have to supply a satisfactory bank guarantee to the seller, our client. A wire came back agreeing to the terms of the sale, stating that as soon as he arrived in San Francisco a satisfac-

(Testimony of James C. Harlan.)

tory bank guarantee would be forthcoming and that the terms of the agreement could be reduced to a written contract. We then met with our client and the buyer and did reduce the agreement to writing but that same day the buyer refused to put up a bank guarantee and walked out on the contract and refused to accept the asparagus. Our client thereafter consigned the asparagus and suffered, by reason of an over supply during the early portion of the asparagus season, a loss estimated at this time of approximately $18,000.00. [60]

In your opinion would these facts bring the complaint within the purview of Chapter 12, Section 1268, of the Act and permit action to be taken by the Department for the revocation of the dealer's license to do business in California. We understand that this firm not only does business as a dealer buying for their own account but also as a commission merchant. Also would it permit of action on the bond? We would appreciate any information you might give us in this connection.

We are, with kindest personal regards,

Very truly yours,

DINKELSPIEL & DINKELSPIEL

By MARTIN J. DINKELSPIEL."

Testimony of

MAXWELL H. ROTHSTEIN

in his own behalf.

Maxwell H. Rothstein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. TORREGANO:

The WITNESS: He resides in Philadelphia and is a member of the firm of H. Rothstein & Son, which consists also of Henry Rothstein and I. Rothstein. The firm has been in business for over thirty years and is engaged in the wholesale fruit and produce business. Over the last ten years the firm averages between one and two million dollars per year. He and Krasnow met Edwards in the latter part of January in Edwards' office in Oakland. They next met Edwards at Isleton on February 8, 1934. Edwards asked $2.25 per crate for the asparagus. He told he was not interested at that price and that when Edwards named a price in line with the market, to get in touch with Krasnow. He did not see or hear from Edwards until the telegram (plaintiff's Exhibit No. 2) received in Seattle, Washington on the 13th of February, 1934. He noticed the words "all asparagus" in the telegram and replied by telegram he wanted "all bunch asparagus" (plaintiff's [61] Exhibit No. 3) He meant by "all bunch asparagus" asparagus nine inches in length at least five inches green or more. As a

(Testimony of Maxwell H. Rothstein.)

matter of fact, they always name in their contracts six to seven inches green as the eastern market do not take white asparagus at desirable prices, and he figured Edwards and he could work those stipulations out when they were together. During his conversation with Edwards, both in Ookland and at Isleton, no discussion was had as to the phrase "all bunch asparagus" nor as to the phrase "all asparagus." In accordance with custom and usage of the trade he understood the term "all asparagus" to mean all the asparagus grown and delivered as the grower sees fit. He did not interpret the use of the words "all asparagus" in Edwards' telegram (plaintiff's Exhibit No. 2) for anything. He thought he would clear himself by answering the wire as he did (plaintiff's Exhibit No. 3). The term "bunch asparagus" has no definite meaning in the asparagus trade. He tried to explain it before there are different kinds of bunch asparagus. Some shippers pack it two pounds to a bunch and some two and a half to three quarters pounds. In accordance with custom and usage of the trade a person purchasing bunch asparagus arranges to have the bunch asparagus graded before he enters into the final contract. When he used the words "don't worry, when we make deal will go through with same" in his telegram (plaintiff's Exhibit No. 3) he meant when the deal is consummated by contract they would go through with same.

(Testimony of Maxwell H. Rothstein.)

Pursuant to the two telegrams (plaintiff's Exhibits Nos. 2 and 3) Krasnow and himself met Edward and Dinkelspiel in Dinkelspiel's office in San Francisco on February 19, 1934. Dinkelspiel said "let's talk about this asparagus contract" and commenced reading a paper. Dinkelspiel said it was a contract. As Dinkelspiel read from the contract he objected to many paragraphs. His objection to the contract was that there was considerable work to be done that was not in the contract. He did not tell [62] Dinkelspiel exactly what he wanted because he did not have an opportunity to sit down and define what he wanted put in the contract. The main discussion was as to how the deal was going to be financed. He stated that he was going to pay by bank guarantee, meaning H. Rothstein & Son would place a bond as a deposit.

Whereupon the telegram (Defendants' Exhibit No. 1) was shown to the witness, who testified that the telegram was sent by him from Dinkelspiel's office to Philadelphia. Edwards stated that he could not understand what he meant by bank guarantee and he told Edwards that in his business it meant that you wire a bank guarantee as to the payment of a draft against the shipment. Edwards stated, suppose you only take the first shipments of asparagus, it would place him at a disadvantage. He told Edwards they were going to place a $5,000 surety bond to remain until the contract was fulfilled and as shipments were made they would wire

(Testimony of Maxwell H. Rothstein.)

the funds on receipt of advice of the shipments. That is the way they had done it for years.

Whereupon, copies of drafts and letters of credit having the name of Corn Exchange National Bank, Philadelphia Trust Company and the Market Street National Bank of Philadelphia, and reading as follows, were shown to the witness:

DEFENDANTS' EXHIBIT A.

"No. A550 Philadelphia, ...19.....

To the Corn Exchange National Bank & Trust Co.

Philadelphia, Pa.

We will honor, if presented to you on or before ....., 19....., draft drawn by..... through....., in the amount of..... ..... Dollars, $..... for cars Nos..... ..... shipped ..... containing ..... providing presented with following documents attached: Individual drafts for each car, with shipper's invoice and original bill of lading, also stamped diversion order showing car rolling open to H. Rothstein & Son. Federal Certificate showing car U. S. No. 1.

We authorize payment on first presentation only

H. ROTHSTEIN & SON

....."

[63]

(Testimony of Maxwell H. Rothstein.)

"Car No..... No. 50
Shipped.....

Individual drafts with shipper's invoice and original bill of lading attached. Also stamped diversion order showing cars rolling open to H. Rothstein & Son, Philadelphia, Pa. U. S. No. 1 Certificate.

Remarks..... Philadelphia.....
Pay To the Order of Draft Drawn by.....
..... $..... Dollars.
To The Corn Exchange National
Bank and Trust Co. H. ROTHSTEIN & SON
Philadelphia, Pa. ....."

"The Philadelphia National Bank No. 506
Philadelphia, Pa.

Dear Sirs: Philadelphia....., 193...

Please open by day letter / night letter wire an irrevocable letter of credit covering the following terms:
in favor of.....
Through .....
Car No. and Commodity.....File No.....
Date Shipped..... To Expire.....
Draft in the amount of $..... to be presented with shipper's invoice and original Bill of Lading attached: Also stamped diversion

(Testimony of Maxwell H. Rothstein.)

order showing car rolling to H. Rothstein & Son, Phila., Pa.

Other attachments: .....

We will execute your usual form of obligation for this credit when presented to us.

H. ROTHSTEIN & SON

$..... .....''

"Drawer..... No. 452.

Car No.....

Shipped.....

Shipper's invoice and original bill of lading attached also stamped diversion order showing car rolling to H. Rothstein & Son, Philadelphia, Pa. [64]

Remarks..... Philadelphia.....

Pay to the Order of.....$.....

.....

H. ROTHSTEIN & SON

.....

To

The Market Street

National Bank

Philadelphia, Pa.'' [65]

Mr. TORREGANO: I call your attention to forms ..... printed matter of H. Rothstein & Son, having the name of Corn Exchange National Bank, Philadelphia Trust Company and the Market Street

(Testimony of Maxwell H. Rothstein.)

National Bank of Philadelphia, Pennsylvania, and ask you if those are forms used by your bank for the purpose of honoring such drafts you discussed with Mr. Edwards when presented?

The WITNESS: Yes.

Mr. DINKELSPIEL: I object to the question, if the Court please, and ask the answer go out, on the ground there is no proper foundation laid. It has not been shown these or similar documents were ever shown to the plaintiff by the defendants.

The COURT: Objection sustained. It will go out.

Mr. TORREGANO: We offer for identification, if your Honor please, these documents, and we take an exception to the ruling of the Court refusing to permit us to show by the witness his arrangement with the bank whereby he was to honor drafts as issued against him.

The COURT: Received as Exhibit A for Identification. Defendants' exhibit.

(Discussion)

Mr. TORREGANO: In order for you to understand my presentation I merely state to your Honor I make the offer for the purpose of showing—for having the record to show what I propose to prove upon the testimony as I offer it which your Honor ruled was inadmissible.

(Discussion) [66]

(Testimony of Maxwell H. Rothstein.)

Mr. TORREGANO: I now offer in evidence, after having made the offer, the documents introduced for identification as Defendants' Exhibit A.

Mr. DINKELSPIEL: Does that mean they are offered as exhibits?

Mr. TORREGANO: It is being offered in evidence as part of the witness' testimony.

Mr. DINKELSPIEL: Then I will object on the grounds heretofore stated, that no proper foundation has been laid.

The COURT: Same ruling.

Mr. TORREGANO: Exception.

The WITNESS: When he made the statement to Edwards that he would put up a surety bond to honor the drafts as the invoices would be presented to his bank, that was his understanding of the language used by him in his telegram (Plaintiff's Exhibit No. 3) that he would guarantee payment. At the time Dinkelspiel was reading the contract to him, no description of the asparagus was contained in it. He did not read it entirely. He told Dinkelspiel that he was not interested in the paper or the contract being read. Dinkelspiel used the words "all asparagus" in reading the contract to him at the conference held in Dinkelspiel's office. He objected to it and told Dinkelspiel he was not interested in buying all asparagus. He told Dinkelspiel he wanted to buy bunch asparagus. Dinkelspiel asked him how he was going to pay for the asparagus, and he agreed to pay by bank guaranty.

(Testimony of Maxwell H. Rothstein.)

That upon receipt of the car numbers when the asparagus were shipped they would buy a bank guaranty to honor drafts on presentation. Their bank would wire the bank in California, guaranteeing payment for the carload of merchandise, and in a deal such as the one in question they generally place a deposit for the fulfillment of the con- [67] tract. He told all of this to Dinkelspiel and Edwards. Dinkelspiel and Edwards both stated that that would be satisfactory. It was around the luncheon hour and they stated that it was necesary that they take the matter up with the Court. The telegram (Defendants Exhibit No. 1) was dictated by Dinkelspiel in the presence of Edwards and Krasnow prior to the luncheon hour. It was dictated after the conversation with reference to putting up a surety bond. When he left for luncheon he said he would return later to draw up the contract with the stipulations agreed upon in the morning conference. At the conference in the afternoon, Edwards stated that he did not care to enter into the agreement discussed in the morning; that he was receiver for the court and did not want to get tangled up in a deal that may cause him some embarrassment; that he was not familiar with bank guaranties and preferred handling the collection in a different manner. Edwards wanted $10,000 placed in cash as a deposit in a bank in San Francisco. Also sufficient funds to take care of all the shipments that would come off that island. He asked Edwards

(Testimony of Maxwell H. Rothstein.)

how many crates of asparagus he expected to ship. Edwards said that it might be fifteen to twenty thousand crates, or more, and he told Edwards at that rate it would mean he would have to have $40,000 placed in a bank immediately to take care of the request, and that this was unreasonable; that they did not know just what the amount of the crop would be. Edwards said "that is the only basis I would be interested." He told Edwards if that is the way he felt he did not believe they were going to be able to do any business, and Edwards said that he did not know whether he would sell the asparagus; [68] that it might be best to later consign it through Roper. He told Edwards did he mean to say he wanted to gamble on the asparagus, and Edwards replied that with the pro-rate plan the asparagus may be worth more than in the past, and he told Edwards that if he felt that way about it, he wished him luck in his new venture. He shook hands with all and left, and then wired Philadelphia to cancel the previous instructions to place the bond. (Defendants Exhibit No. 1), as Edwards would not agree to the original terms. At the time he left the conference, Dinkelspiel stated he was sorry there was so much lost on the negotiation of the contract, and that they could not get together, and he told Dinkelspiel and Edwards that he was sorry they could not get together. Whereupon, a letter dated May 11th, 1934, was shown to the witness, and it was stipulated to that said letter was

(Testimony of Maxwell H. Rothstein.)

sent and received by the witness, which letter reads as follows:

DEFENDANTS' EXHIBIT C.

"Law Offices of
Dinkelspiel & Dinkelspiel
14th Floor
Pacific National Bank Building
333 Montgomery St.
San Francisco, Calif.

May 11, 1934.

M. H. Rothstein & Son,
Curtis Exchange Bldg., 3rd & Walnut,
Philadelphia, Pa.

In re: George N. Edwards, Receiver in Equity,
Golden State Asparagus Company
vs. Yourselves.

Gentlemen:

You will recall in the early part of February of this year your firm entered into a contract with George N. Edwards as Receiver in Equity of Golden State Asparagus Company wherein and whereby you agreed to take all of the green asparagus raised by him up to and including April 5th, 1934, at $2.00 per crate, f.o.b. cars out and that you agreed to furnish a satisfactory guarantee. You will also recall that you failed and" [69] "refused to furnish this guarantee and that you therefore by reason of said

(Testimony of Maxwell H. Rothstein.)

breach did not purchase any of the asparagus from our client, necessitating his selling it on the open market. Mr. Edwards has computed that by reason of the failure on your part to carry out the terms of the agreement entered into with him, the difference in the sale price between what he received for the asparagus and what he would have received under the contract amounts to $18,000.00, and demand is hereby made upon you for an adjustment in that sum without delay.

We might mention that unless satisfactory arrangements are made looking to the settlement of this claim a formal complaint will be made with the Division of Market Enforcement and the Department of Agriculture at Sacramento and suit will be commenced against you for the amount of the claim.

May we hear from you without further delay.

Very truly yours,

DINKELSPIEL & DINKELSPIEL,

By MARTIN J. DINKELSPIEL.

MJD:N"

Mr. TORREGANO: We offer the letter in evidence, if your Honor please.

Mr. DINKELSPIEL: We object to it, if the Court please as being a letter that calls for a settlement of a claim. It is an offer of compromise. I ask counsel to submit it to the Court.

(Testimony of Maxwell H. Rothstein.)

Mr. TORREGANO: We offer that letter solely for the purpose of setting forth the description of the property referred to therein and for the further purpose of showing the amount of the demand being made upon the defendants—for that limited purpose.

(Handing paper to Court)

The COURT: Read the statement of Mr. Torregano, Mr. Reporter.

(Statement read) [70]

Mr. TORREGANO: And also for the purpose of showing the nature of the guarantee.

The COURT: Read the statement of Mr. Dinkelspiel.

(Objection read)

(Discussion)

The COURT: I will sustain the objection.

Mr. TORREGANO: We offer now, if the Court please, the letter for identification, and note an exception to the ruling of the Court.

The COURT: It will be received as Defendants' Exhibit C for identification.

The WITNESS: There was a market for bunch asparagus in the City of New York between the dates of February 19th and April 10th, 1934. Also, in the City of Philadelphia. There is an established way among the produce dealers to ascertain the market value of asparagus. The terminal markets issue

(Testimony of Maxwell H. Rothstein.)
the Government bulletin daily, showing what the commodities sell for.

Whereupon, the witness was shown a copy of the official market reports on asparagus sold to jobbers in the City of Philadelphia for the period covering February 21st through April 29, 1934, inclusive, issued by the United States of America, Department of Agriculture, certified October 7, 1935, by Milo Perkins, assistant to the Secretary of Agriculture, pursuant to Title XXVIII, Section 661, United States Code, which copy was offered and received in evidence and marked "Defendants' Exhibit No. 3". The price quotations set forth in said Exhibit and the classifications of the asparagus therein are the same as the prices and classifications quoted in Plaintiff's Exhibit No. 9 hereinafter referred to for the City of Philadelphia.

Whereupon, the witness was shown a copy of the official market reports on asparagus for the City of New York for the period covering February 13th through April 30, 1934, inclusive [71] issued by the United States of America, Department of Agriculture, certified October 7, 1935, by Milo Perkins, assistant to the Secretary of Agriculture, pursuant to Title XXVIII, Section 661, United States Code, which copy was offered and received in evidence and marked "Defendants' Exhibit No. 4". The price quotations set forth in said Exhibit and the classifications of the asparagus therein are the same as the prices and classifications quoted in Plaintiff's

(Testimony of Maxwell H. Rothstein.)

Exhibit No. 9 hereinafter referred to for the City of New York.

Mr. TORREGANO: Amongst the asparagus trade or industry is there a general custom and usage which covers the making and execution of a contract and any contract to sell asparagus? [72]

Mr. DINKELSPIEL: I object to the question, if the Court please, as not being specific—as being general. We have had evidence there are jobbers and commission houses and there are four or five different grades of sellers and purchasers of asparagus.

The COURT: I will allow the question.

Mr. DINKELSPIEL: Exception.

The WITNESS: Yes.

Mr. TORREGANO: Is there also a custom and usage prevailing in the asparagus industry or trade governing negotiations preliminary to the making of a contract for the sale and the purchase of asparagus by a shipper from a grower?

The WITNESS: Yes.

Mr. DINKELSPIEL: I object to the question, if the Court please, on the ground it is incompetent, irrelevant and immaterial. The very point in the question, whether there is a custom or usage in connection with negotiations strikes me as being a little far-fetched. I mean, I can't quite fathom a question of usage with respect to negotiations. The very word "negotiations" negatives custom and usage. [73]

(Testimony of Maxwell H. Rothstein.)

Mr. TORREGANO: In the pleadings in this court, amongst the defenses asserted by the defendant, is that there was a negotiation prior to the making of a contract. I am now asking the witness to disclose to the jury and the Court as to whether or not, amongst the asparagus trade, there is a custom and usage—there is a custom which governs the negotiations preliminary to the making of a contract.

Mr. DINKELSPIEL: Then, I will add to my objection, if the Court please, that the answer of the defendant, I believe, alleges there were negotiations looking toward a contract. That is one of their defenses. They maintain they were purely negotiations; but if they rely, as a matter of defense, on custom and usage, it must be affirmatively pleaded; and I object on the ground it is not within the issues of this case.

(Discussion)

The COURT: I will allow the question.

Mr. DINKELSPIEL: Exception.

Mr. TORREGANO: Will you answer?

WITNESS: Yes.

Mr. TORREGANO: I will ask you: According to the trade custom and usage of the asparagus industry, what is customarily to be placed in any writings of negotiations between a seller—that is, a grower and a purchaser or shipper in regard to the sale and purchase of asparagus?

(Testimony of Maxwell H. Rothstein.)

Mr. DINKELSPIEL: I object on the ground a specific contract superseded trade custom and usage; and the only time trade custom and usage can be called upon to vary the terms of a written contract would be where the contract is silent in any [74] particular regard or respect; whether the contract is ambiguous.

(Discussion)

Mr. TORREGANO: I want to first show, if your Honor please,—there is a distinct custom amongst the trade and usage,—in the asparagus trade,—in connection with preliminary negotiations for a contract, whereby the parties in the preliminary negotiations assert they will do certain things; but thereafter and according to the custom and usage of the trade, they reduce to writing these specific things which they are required to do, so as to remove any ambiguity as to the preliminary negotiations.

The COURT: I will allow the question.

Mr. DINKELSPIEL: Exception.

The WITNESS: It is customary to have a clear understanding what the seller is selling and what the buyer is buying. The buyer wants to know what ranch he will be getting the asparagus from, if there are any crop liens, the age of the asparagus, when the cutting is to be done, the length of the asparagus, how it is to be graded, how it is to be packed, where it is to be delivered, and when delivered to

(Testimony of Maxwell H. Rothstein.)

cars whether the shipments are to be made by express, local or freight cars, or any particular railroad, if the asparagus should be pre-cooled, and if the asparagus is to be bunched; there are different grades of bunch asparagus, and there are different weights; these specifications are generally written up in a contract, on preliminary negotiations those things are discussed and thereafter reduced to writing according to the custom and usage of the trade.

Mr. TORREGANO: Mr. Rothstein, calling your attention to Plaintiff's Exhibit 3, I want you to read it again, yourself; and tell me when you sent that telegram to Mr. Edwards, [75] the receiver of the Golden State Asparagus Company,—the plaintiff in this case. Did you consider yourself bound to take all of the asparagus which Mr. Edwards offered to ship to you, in this telegram,—plaintiff's Exhibit No. 2; and also that you considered yourself bound to put up any guarantee of payment until you had received from Mr. Edwards a contract in writing?

Mr. DINKELSPIEL: I object to the question on the ground, first of all, it calls for the opinion and conclusion of the witness, on a matter the jury should properly pass upon, on a conclusion of law; and further, it is hypothetical, in that it does not call for any facts; and on the further ground that the documents speak for themselves; and the witnesses's opinion as to their effect is beyond his province as a witness.

Mr. TORREGANO: I would like——

(Testimony of Maxwell H. Rothstein.)

The COURT: (Interrupting) I would rather not hear the argument. I believe that he can say what he—as intended by the written contract. It is true that it doesn't bind that interpretation on the Court and jury, unless they wish to interpret, under all the circumstances of the case, such interpretation; but I think he has certainly a right to say whether he meant a certain thing in a contract. That's as far as it goes here; it doesn't change the text of the writing. I will allow it.

Mr. DINKELSPIEL: Exception.

The WITNESS: No.

The WITNESS: In the custom and usage of the asparagus trade, there is a difference between the terms "bunch asparagus" and "all shipping asparagus." "All shipping asparagus" can mean that you can [76] ship all asparagus, and "bunch asparagus" means graded asparagus as to the length, the amount of green, the weight, and how it is to be packed, there is no distinction between "all shipping asparagus" and all "green shipping asparagus."

Whereupon, the witness was shown a contract entered into in 1931, between Edwards, as Receiver, and H. P. Garin and Company and H. Rothstein and Son, which contract was stipulated to be an exact copy of the original contract, and was thereupon offered and received in evidence and marked

"DEFENDANTS' EXHIBIT No. 5",

reading as follows:

"THIS AGREEMENT made and entered into this ..... day of February, 1931, by and

(Testimony of Maxwell H. Rothstein.)

between GEORGE N. EDWARDS, as Receiver of Golden State Asparagus Company, a California corporation, hereinafter referred to as the 'receiver', and H. P. GARIN COMPANY, a California corporation, and H. ROTHSTEIN and ..... ROTHSTEIN, copartners doing business under the firm name of H. ROTHSTEIN & SON, of Philadelphia, Pa., hereinafter referred to as the 'buyer';

WITNESSETH:

WHEREAS, said GEORGE N. EDWARDS is the duly appointed, qualified and acting receiver of Golden State Asparagus Company, a corporation organized and existing under the laws of the State of California, in an action now pending in the District Court of the United States in and for the Northern District of California, Southern Division, entitled American Can Company, a corporation, plaintiff, versus Golden State Asparagus Company, a corporation, defendant, No. 2683-E, In Equity; and

WHEREAS, the receiver is now farming a 300 acre tract of land on Andrus Island in the County of Sacramento, State of California and another tract of land about 822.4 acres in area on Brannon Island, in the same county, both of which tracts of land are now planted and grown to asparagus; and

WHEREAS, the receiver is in need of at least the sum of $15,000.00 to pay some of the

(Testimony of Maxwell H. Rothstein.)

current obligations incurred during his said receivership, and in particular, to discharge $12,500.00 in receiver's certificates heretofore issued by him; and

WHEREAS, the buyers have agreed to advance and lend the sum of $15,000.00 and to accept receiver's promissory note therefor if said promissory note can be secured by a crop mortgage on the aforesaid crops of asparagus grown by the receiver, on said tracts of land situate on Andrus and Brannon Islands, in the [77]County of Sacramento, during the asparagus season of 1931 and 1932; and

WHEREAS, the receiver has agreed to sell, and buyers have agreed to buy, all of the merchantable green shipping asparagus grown by the receiver on said tracts of land on said Andrus and Brannon Islands, during the asparagus seasons of 1931 and 1932, subject to the approval by the said United States District Court of receiver's acts in making the arrangements detailed herein, and a formal order by said Court authorizing said receiver to execute this agreement and the promissory note and crop mortgage above referred to;

NOW, THEREFORE, in consideration of the premises and the mutual agreements herein contained, the parties hereto agree as follows:

1. The sum of $15,000.00 shall be advanced and paid to the receiver on the execution of him of this agreement, together with the execution

(Testimony of Maxwell H. Rothstein.)

by him of a promissory note in favor of the buyers in the sum of $15,000.00, and the like execution of the crop mortgage herein above referred to, and shall be contingent upon the approval by the Judge of the United States District Court in which said receivership is pending of all of said agreements and his authorization to the receiver to execute the same.

2. The receiver agrees to grow, mature, cut and deliver on said tracts of land hereinabove referred to first class crops of merchantable green shipping asparagus during the years of 1931 and 1932, and the buyers agree to buy and receiver up to the 1st day of April of each of said years, all the merchantable green shipping asparagus so grown by the receiver and to pay therefor the following prices:

a. Five cents (5¢) per pound F.O.B. points of loading for all such asparagus grown by the receiver on the said 822.4 acre tract of land situate on Brannon Island;

b. Four cents (4¢) per pound F.O.B. points of loading for all such asparagus grown by the receiver on said 300 acre tract of land situate on Andrus Island.

The points of loading herein referred to shall be points on roads, rivers or sloughs (as the case may be) convenient and adjacent to said tracts of land, and shall be selected and designated by the buyers at the commencement of each asparagus season during said years.

(Testimony of Maxwell H. Rothstein.)

3. The time and manner of said payment shall be as follows: during the asparagus season of 1931 the buyers shall be entitled to repay themselves $7500.00 [78] of the total advance of $15,000.00 made to the receiver (and hereinabove referred to) by crediting the receiver with the sale price of the first asparagus delivered to them by the receiver, but the receiver shall be entitled to demand and to receive from the buyers partial payment on the sale price of said asparagus at the rate of two cents (2¢) per pound for each pound of asparagus delivered to the buyers until such time as the buyers shall have received a sufficient quantity of asparagus to have repaid themselves said sum of $7500.00, when the receiver shall be entitled to the full sale price. Said partial payments, and payments of the full sale price, hereunder, shall be due and paid by the buyers at the end of each two weeks period during the harvest and delivery of said asparagus. Provided, further, that if said sum of $7500.00 has not been repaid the buyers by April, 1931, they shall be entitled, at their option to deliveries after said date until said sum has been paid.

4. All asparagus delivered to the buyers hereunder shall be carefully cut according to buyers directions so that it will not be bruised or tip broken, and shall be delivered at loading points designated by buyers as hereinabove provided on the river bank, or roadside as the case

(Testimony of Maxwell H. Rothstein.)

may be, on the day it is cut in time for the buyer's boat or truck to pick it up in the late afternoon.

5. All asparagus delivered hereunder shall have as near five inches of green tip as possible and shall be cut at least ten inches long in order to maintain a nine inch bunch for shipping. Asparagus more than ten inches in length will be received by buyers and the butts thereof shall be cut off in order to make a nine inch bunch and the weights of all butts cut to make a nine inch bunch shall not be chargeable to or paid for by the buyers. Provided, however, that during the first ten days of the asparagus season the buyers may waive the requirement as to length and color and accept delivery of asparagus not complying with the specifications herein provide.

All asparagus delivered hereunder shall calibrate at least three eighths (3/8) of an inch in diameter, at the tip and green end and shall be larger at the butt end. Neither shall it be seeded or flowered nor broken, hollow, crooked, rusty or bug eaten but must in all respects be fit for the eastern markets under the customary standards of the season.

All asparagus must be delivered dry and unwashed, unless during the rainy season said asparagus shall be generally muddy, and the buyers shall require the receiver to wash it.

All asparagus delivered hereunder shall be

(Testimony of Maxwell H. Rothstein.)

weighed at the buyer's packing house in S. P. Warehouse at Isleton, California by receiver's represen- [79] tative and it is mutually understood and agreed that title to the asparagus delivered hereunder shall pass to the buyers when said asparagus is weighed at said packing house.

7. The receiver may cancel this agreement insofar as it affects the sale of asparagus for the asparagus season of the year 1932 at any time before July 1st, 1931, by paying the buyers the balance of said sum $15,000.00 due them and by notifying them in writing of his election to cancel the agreement.

8. The receiver may also elect to discontinue growing any or all of said asparagus on the said 300 acre tract of land situate on Andrus Island after the asparagus season of the year 1931, and it is mutually agreed that if this election is made by July 1, 1931, and notice thereof given to the buyers, all obligations of the receiver to grow, mature, cut and deliver a crop of asparagus on said island shall thereupon cease.

9. It is mutually understood and agreed that the term 'merchantable green asparagus' used herein shall mean all asparagus meeting the requirements of paragraphs 4 and 5 hereof.

10. This agreement does not contemplate anything but green shipping asparagus, maturing not later than April 1st of either year

(Testimony of Maxwell H. Rothstein.)

and the buyers are not required to accept any asparagus after April 1st of either year unless by mutual agreement with the receiver the buyers agree to accept further deliveries on terms to be also agreed upon.

11. It is further understood that the balance of said sum of $15,000.00 remaining unpaid after the 1st day of July, 1931, if any there be, shall be repaid out of credits from the first asparagus delivered to the buyers during the season of 1932, but the receiver shall also be entitled to demand an advance of two cents (2¢) per pound at the end of each two weeks when deliveries are being made, as in paragraph 3 hereof provided.

12. Nothing herein provided shall be construed as personally binding upon the said receiver, GEORGE N. EDWARDS, and it is to be distinctly understood that this agreement is made and entered in his official capacity as said receiver with the consent of said United States District Court. In the event that the said sum of $15,000.00 advanced hereunder by the buyers is not fully paid as herein provided, it shall be a direct obligation upon the assets in said receiver's possession, and shall be repaid as soon as possible.

This agreement shall be binding upon the successors or assigns of said receiver and upon the [80] heirs, personal representatives or assigns of the said buyers.

(Testimony of Maxwell H. Rothstein.)

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed the day and year first above written.

.....

H. P. GARIN COMPANY

.....

By .....

President

H. ROTHSTEIN & SON

.....

....."

Cross Examination

By Mr. DINKELSPIEL:

The WITNESS: He does not recall signing or reading the foregoing contract. He read it approximately the time they entered into the deal. It is the usual type of contract. He does not know whether it contained all of the elements that should be present in all contracts of this kind according to the custom and usage of the trade. He might have entered into an agreement that did not contain all the customary features he testified to. He has no regular printed form of grower's contract for the asparagus industry. In most deals with the grower the contract has to stand on its own feet, he would not say this as to every deal. He has been coming out into this territory of the Pacific Coast probably 12 or 14 years, sometimes he personally conducts negotiations and other times he has different dealers or brokers or representatives negotiate for him. Mr. Garin was a repre-

(Testimony of Maxwell H. Rothstein.)

sentative of his in 1934. Krasnow was an employee of his to some extent, he paid Krasnow a percentage of the profits. Krasnow's duty was to find crops which the witness in turn would buy or negotiate for. He had been up on the Delta in and around the different islands in Sacramento and looked over the fields to see who had the best asparagus and [81] *and* who had asparagus for sale on many occasions, but he cannot recall being up there at that particular time, the latter part of January, 1934 or before—the forepart of February. He is familiar with the country up there to some extent. He did not altogether depend upon Mr. Krasnow to tell him what asparagus was available. Krasnow suggested going to see George Edwards at his office in Oakland in 1934, in the month of February. It was stipulated that Krasnow told Mr. Rothstein to see Edwards with regard to entering into a deal in 1934. He discussed with Krasnow the kind of asparagus he was looking for, the best quality that is being shipped, he wanted bunch asparagus and some loose asparagus. At the meeting in Oakland he told Edwards he was interested in "shipping asparagus" not "canning asparagus". He presumed Edwards had some idea they sold most of their asparagus in Eastern markets. He did not know exactly the quantity and kind of asparagus Edwards had for sale. Bunch asparagus should be nine inches and straight spears, and not less than five inches green; it is usually figured on six to seven inches green, and it can also be known

(Testimony of Maxwell H. Rothstein.)

as "short grass". They may never be over five or six inches in length. Such bunch pack is to be straight and not up to the standard best grade, and would sell at a much lower figure on the market. There are three kinds of bunch asparagus, the two pound bunch, two and a quarter pound bunch, two and a half pound bunch and two and three-quarter pound bunch. Some shippers will take a larger bunch of grades and some smaller. He can't recall just what kind of deals they had in 1934 without getting the record. He presumed he had written contracts with growers in 1934. They had some, but he can't recall the basis. He recalls he had written contracts. He can't recall whether they were prepared by any attorney. He can not recall any grower that he bought asparagus from for shipment East during the year of 1934. He can't name them without the record. He has some in mind but [82] he cannot give the details. They dealt with the Liberty Farm, that was a consignment deal. He did not make a purchase and it wasn't necessary to have a contract. He cannot recall whether he had a deal in the year 1934 with a grower named Brown. Offhand, he doesn't remember anything about from whom he bought any asparagus in the year 1934. He would not say he recalled all particulars of the conversation *be* he recalls a conversation in Mr. Dinkelspiel's office, February 19, 1934, he recalls the substance of all the conversations. The term "bunch asparagus" does not have a definite meaning in the asparagus trade. You cannot

(Testimony of Maxwell H. Rothstein.)

use the words "bunch asparagus" to cover the definition of all the different grades, and packs, etc. In other words, you can't sell a buyer bunch asparagus. The buyer would want to know something about it. The term "bunch asparagus" does mean something and it [83] does not. You can answer it both ways.

Mr. DINKELSPIEL: And when you buy a grower's entire crop of bunch asparagus, you don't specify so many crates of colossal and so many crates of this and so many of that? You pay him a blanket price for his entire crop of bunch asparagus, don't you?

The WITNESS: Not exactly. You have to understand what kind of bunch asparagus you are buying.

Mr. DINKELSPIEL: Do you or don't you?

The WITNESS: No.

Mr. DINKELSPIEL: Have you any contract you can refer to where you have specified the number of crates of different grades of mammoth or colossal or these different grades of asparagus from any grower where you bought his entire crop?

The WITNESS: Contracts are not made up that way.

Mr. DINKELSPIEL: You haven't such a contract?

The WITNESS: No one else has.

Mr. DINKELSPIEL: All they refer to is 'bunch pack"?

The WITNESS: No.

(Testimony of Maxwell H. Rothstein.)

Mr. DINKELSPIEL: Did you, by any chance, intend to make an offer to Mr. Edwards in your wire from Seattle, of February 13, 1934?

The WITNESS: I——

Mr. TORREGANO (Interrupting): Just a minute. We object on the ground that the writing is the best evidence and speaks for itself.

The COURT: Objection overruled.

Mr. TORREGANO: Note an exception.

The WITNESS: Your Honor, I don't think——

The COURT: (Interrupting) A man can always say what his intention was.

The WITNESS: I didn't get it.

The COURT: Read the question.

(Question read)

[84]

The WITNESS: I don't know just what you mean by that offer.

The COURT: I presume you know every contract is an offer and acceptance. Now, were you offering a contract in that telegram to Mr. Edwards?

The WITNESS: Yes, he meant by his telegram (Plaintiff's Exhibit No. 3) that he was willing to confirm the $2.00 price and the stipulation of the contract was to be agreed upon, that is, as to the grade and pack and manner of payment. He meant by the words "bunch asparagus" in the telegram that he was going to get the very best grade of bunch asparagus, and have that understood when

(Testimony of Maxwell H. Rothstein.)

the contract was drawn up. The term "all bunch asparagus" as used by him did not include all qualities of bunch asparagus. He did not say anything about quality in his telegram, he expected to work it out at the meeting. He was going to have it understood in writing just what he was going to get. He knew where the asparagus was raised and produced, that was discussed on February 19, 1934, but there was nothing discussed on that particular date. They didn't get to that point where the asparagus was going to come from. He understood where the asparagus was being grown that they were contemplating entering into a contract for. He learned it from Mr. Krasnow over a telephone conversation, when he believes he was in Seattle, he can't recall whether it was before or after February 12th. It happened about the time he received a telegram from Edwards. He don't remember who called whom in this particular conversation. He believes Mr. Krasnow stated that he could buy Mr. Edwards' asparagus, or that he had bought it, subject to his approval. Just the exact wording of it he can't recall. It was just a conversation along those lines. Knasnow had mentioned the price $2.00 per crate. He believes he stated he could buy Mr. Edwards' asparagus for $2.00 per crate for bunch grass from Brannan Island, that is his best recollection. He did say that Mr. Edwards was going to confirm the asparagus to him [85] by wire, and naturally he received

(Testimony of Maxwell H. Rothstein.)

a wire from Mr. Edwards. This happened about the time he received Mr. Edwards' wire. The conversation took place before Mr. Edwards' telegram. He can't recall in this conversation with Krasnow whether he asked him anything at all about the quantity of the asparagus which would be delivered by Mr. Edwards, nor how much he would be obliged to pay for the asparagus, nor did he know the approximate quantity of the asparagus that would be delivered by Mr. Edwards under such an arrangement. He had no idea just what he was shipping. When you purchase a grower's crop of bunch asparagus, you do not know at the time you make the deal what sizes of bunch asparagus will be in the crop, that is, how much jumbo, fancy, select or extra-select, etc., and that is the reason stipulations are made in the contract. The firm of H. Rothstein and Sons does not sell in San Francisco or the local market. The asparagus he buys goes principally to the Eastern Seaboard. There are twelve bunches of asparagus to a crate. A bundle of bunch asparagus would have fifteen or sixteen spears of asparagus. A crate of bunch asparagus, to his knowledge, has no standard weight and will range from thirty-four to thirty-five pounds, depending on the packer. He had gone out in the field to look over a crop before buying it one or two times. He usually depends on representatives such as Krasnow. It may be Krasnow, or it may be another shipper in the business and then they determine some of the sources

(Testimony of Maxwell H. Rothstein.)

they have on asparagus received on the market. His firm has made some deals without seeing the product growing and they buy it with the specifications that it would have to meet certain conditions. They do not buy a cat in the bag. They usually know what they are doing before they close a deal. At Isleton they asked Edwards if he was ready to name a price for the asparagus. At the meeting with Edwards at Isleton, he does not recall whether he used the term "bunch asparagus", he presumes so, he can't [86] recall the exact wording. He was interested in buying asparagus either in bunches, or it might be loose. He does not know what kind of asparagus Edwards meant when Edwards said he would consider around $2.25 a crate. He was familiar to some extent with prices for "bunch pack asparagus" and "loose pack" in that industry. He told Edwards he was not interested at $2.25 per crate. He can't recall making any offer. He recalls testifying at the last session before leaving he again repeated when Edwards decided to name a price in line with the market, the prices talked about and offered on the Sacramento River, to get in touch with Mr. Krasnow as he was leaving for Seattle and did not know whether he would return or not. At the time Mr. Edwards quoted the price to him and which he said was too high, he did not know that his grass was flooded or where it was located and notwithstanding these factors, which determines the price of grass, he said it was too high. Grass

(Testimony of Maxwell H. Rothstein.)

early and in good condition might be worth $2.50 a crate. After leaving Isleton he kept in touch with Mr. Krasnow to some extent. He did not discuss with Edwards at Isleton reducing any deal that they might make to writing. He cannot recall anything being said about a guaranty in order to protect Edwards, in any contract that might be made. He does not recall whether or not Edwards verbally quoted him a price of $2.00 per crate f.o.b. cars Isleton for bunch asparagus from Brannan Island. He does not remember after he left Isleton whether he notified Krasnow either by wire or telephone to notify Edwards that he would accept a price of $2.00 a crate F.O.B. cars Isleton for bunch asparagus. He does not recall Edwards telling him at Isleton that he would hold the asparagus $2.00 F.O.B. cars for bunch grass at Isleton for a few days so that he would determine whether he wanted it or not and to notify Edwards either directly or through Krasnow.

At the meeting on the 19th day of February, 1934, at [87] Dinkelspiel's office, he does not recall whether or not Edwards told him that Edwards had stood by until receiving the wire (Plaintiff's Exhibit No. 3) and Krasnow's instructions that they were accepting the asparagus and that Edwards had turned down other offers until he had heard from Krasnow. He does not recall stating at the meeting to Edwards, Krasnow or Dinkelspiel "what are we here for", we have our deal. I don't know what

(Testimony of Maxwell H. Rothstein.)

you want this meeting for." He demanded the contract and wanted to know what the contents of the contract were before entering into a deal as to the negotiations for paying for this merchandise, etc.

Whereupon, the original contract entered into in 1931 between Edwards, as receiver, H. P. Garin Company and H. Rothstein & Son, was offered and received in evidence and marked Plaintiff's Exhibit No. 5, said Exhibit being the original of the copy heretofore set forth at page 38, and marked Defendants' Exhibit No. 5, said original being signed H. P. Garin Company, H. P. Garin, President, H. Rothstein & Son, by M. H. Rothstein and H. Rothstein.

The WITNESS: At the conference on Feb. 19, 1934, Edwards wanted to know how a bank guarantee was going to be handled as he was not familiar with bank guarantees and Edwards asked him some questions, asked him to explain it which he did. He told Edwards the bank guarantee method is handled with his bank, that his bank would wire the seller's bank guaranteeing the payment of a draft against a carload shipment. The amount guaranteed would be that day's shipment. The "bank guaranty", as he intended was that when shipments were made and Edwards wired his firm in Philadelphia giving the car numbers, his firm would wire a "bank guaranty" against the shipment, and that was the usual and customary method of handling bank guaranties for years and years. Up until the

(Testimony of Maxwell H. Rothstein.)

time that the car is shipped and up until the time that Edwards has wired his bank, his bank is under no obligation under that plan. If, in the meantime he instructed his bank not to honor [88] the draft, Edwards' wire could not make the bank pay. He would like to explain that they would not instruct their bank not to honor Edwards' draft or issue any order of that nature. The deal would be under contract, and they would place a bond or security until the contract was fulfilled. He told Edwards that if he requested his bank to put up $40,000 in a deal of that nature they might think he was crazy. He did state he was willing to place a deposit for the fulfillment of the deal and pay for each car as it was shipped. He recalls Dinkelspiel stating under an irrevocable letter of credit or under the other arrangement suggested of a bank guaranty by a local bank under instructions from his Philadelphia bank that there would be no liability on his part, nor would his bank have to put up any moneys except as and when shipments were made. [89]

They agreed upon a form of guarantee at the morning conference by which they agreed to pay for each shipment as they are made in carload units by bank guarantee having his bank instruct the bank at San Francisco to pay Edwards' draft against the car number and contents, and the original bill of lading, documents attached, showing the car is rolling to them. Edwards stated "suppose that you take delivery of earlier cars and later in a deal walk

(Testimony of Maxwell H. Rothstein.)

away from it." He told Edwards they did not do business along that line and Edwards said "I realize your reputation is all right, but I am only acting as receiver for the court and can't do anything I might be criticized for." He repeated to Edwards that the only way they could give him assurance is by placing a bond; and that he was willing to place a bond for $5000 for the fulfillment of the contract and pay Edwards for the shipment. That discussion took place principally in the morning. They discussed what the guarantee was to consist of before they knew the amount of the crates that were going to be shipped or the size of the deal.

Redirect Examination

By Mr. TORREGANO:

The WITNESS: Edwards said that a surety bond would be satisfactory.

Testimony of

BEN B. KRASNOW,

called as witness for the defendants.

Ben B. Krasnow, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

The WITNESS: That he resides in Sacramento, California, and by occupation is a grower, packer, distributor and broker in fruits and vegetables, and has been for thirty-five years; that he has handled

(Testimony of Ben B. Krasnow.)

sales between growers and shippers of asparagus; that there is a custom and usage in the asparagus business regarding negotiations by grower and shipper for the sale of [90] asparagus and also as to entering into a final contract in regard to the sale of asparagus. He attended the conference in Dinkelspiel's office on February 19th, 1934. Dinkelspiel picked up a paper and said to Rothstein "You are paying $2.00 for this asparagus." Rothstein said "Yes, $2.00 for bunch pack asparagus". Dinkelspiel said "What kind of a payment do you want, George?" [91]

Edwards said "Well, we have got to have some security." Dinkelspiel said "What kind of security?" Edwards said: "We ought to have a bond." Edwards then stated that he had to have a $5,000 bond to stay until the contract was fulfilled. Dinkelspiel then asked Rothstein "Is there any way to arrange a bond?" Rothstein said: "We will wire our Philadelphia office to arrange that." The girl was called in and Dinkelspiel dictated the telegram (Defendants' Exhibit No. 1) and Dinkelspiel then asked them to come back in the afternoon at two o'clock. Rothstein said that Krasnow would represent him in this deal after the contract was signed and the proper negotiations for the bond were taken place. The specifications discussed at the meeting on February 19th with regard to the asparagus that was to be inserted in the contract was "bunch pack

(Testimony of Ben B. Krasnow.)

asparagus". In the afternoon, Edwards said the $5,000 bond was not sufficient, and they had to have more money. Rothstein did not state to Edwards or Dinkelspiel that he would not put up the $5000 surety bond.

According to the custom and usage of the asparagus trade, the term "bunch asparagus" has a definite meaning. It means the best asparagus, segregated from the field run of asparagus, with culls, hooks and crooks and broken tips discarded, and consists of so many spears to each bunch. There are five different grades of bunch asparagus.

Mr. DINKELSPIEL: May I see what the witness is reading from?

The WITNESS: Yes.

The COURT: Can't you testify without the aid of that paper?

The WITNESS: No, or no one else can about the number of spears in a——

The COURT: (Interrupting) In other words, whenever you have any dealings in asparagus—or had any dealings in asparagus or there is a discussion you have to refer to that to find the definition.

The WITNESS: No, I know the grades on the paper; but I am [92] trying to find out the number of stalks. Jumbo is 15 or 20, and colossal—, the first grade is colossal, the second grade jumbo, the third grade extra select, the fourth grade select, fifth grade extra-fancy. The term "all asparagus" does not mean the same as "all Bunch asparagus."

(Testimony of Ben B. Krasnow.)

Each grade of bunch asparagus has a different specification, different sizes of each stalk, color, length and so many stalks to the bunch.

Cross Examination

By Mr. DINKELSPIEL:

The WITNESS: The asparagus grown on Andrus Island is smaller than the asparagus from Brannan Island. A purchaser would not pay the same price for the bunch pack from Andrus Island as he would for asparagus from Brannan Island. He has been in the produce business, shipping, buying and raising produce for thirty-five years. He is forty years old. He started at the age of five years pushing a cart. He is familiar with the majority of the asparagus beds and the conditions on the Sacramento River. He is familiar with the Andrus Island and Brannan Island beds of asparagus and was familiar with these beds in 1934. [93]

At the conference held in Dinkelspiel's office, when the discussion of the money matters was not agreeable to Rothstein and Edwards or Dinkelspiel, Edwards stated that they couldn't make a deal and would call the thing off; that they all shook hands and said goodbye.

He was not working for Rothstein at that time and never worked for Rothstein. He has deals with him. He does not recall a conversation on Friday evening last with Edwards at Sacramento. He don't remember whether he had a talk over the telephone

(Testimony of Ben B. Krasnow.)

with Edwards Saturday morning last. He did not discuss this case with anyone before he took the witness stand. He did not discuss the case with anyone during the time he was sitting in the courtroom and at recess yesterday. He did not speak to anyone about this case since he left the witness stand this morning. He is not working for Rothstein at the present time. He never worked for him. Last week he sold Rothstein five cars of muscats. If the opportunity presents, he hopes to do business with him again. At the conference, Edwards stated he wanted $10,000 cash to be put up as a deposit and that he wanted money in the bank for 15,000 or 20,000 crates of bunch asparagus all told, $30,000 or $40,000 in a San Francisco bank deposited to Edwards' account. The first he heard anything said in connection with a guarantee—bank or otherwise—in connection with the deal in Dinkelspiel's office. Before the meeting on the 19th Rothstein went to Sacramento to see him. He sent the wire (Plaintiff's Exhibit 4) from Sacramento to Edwards in care of Dinkelspiel's office because Edwards told him he would be there when the appointment was made possibly three days before that. He had never seen the telegrams (Plaintiff's Exhibits Nos. 2 and 3). Before the meeting in Dinkelspiel's office he spoke to Rothstein and told him he had talked to Edwards and negotiated a $2.00 price and told Edwards to wire Rothstein at Seattle. During the conversations [94] he did not discuss the wires. (Plain-

(Testimony of Ben B. Krasnow.)

tiff's Exhibits Nos. 2, 3.) He recalls Dinkelspiel reading from a document during the conference, and that Rothstein stopped him when he said "all asparagus", and Rothstein said "bunch asparagus". Dinkelspiel never read a contract in his office. Dinkelspiel read from a blank piece of paper in his hands and was reading from a paper. Dinkelspiel never had a contract made in the morning and never finished the contract. The first thing said regarding money matters was a bond discussion. There was no discussion with reference to the quantity of asparagus to be delivered in the morning. He doesn't know, they could not, because no one knows how much a bed of asparagus will produce until it matures. He came back in the afternoon after 2 o'clock, he would not say it was 3:30. Dinkelspiel said in the afternoon that if a $10,000 bond was not put up, they could not do business. In the morning, Dinkelspiel had agreed to accept $5,000.

Redirect Examination

By Mr. TORREGANO:

The WITNESS: Rothstein said at the conference to Dinkelspiel and Edwards that he would have his bank in addition to the surety bond which he was putting up, wire for the payment of [95] each draft as each car was rolling. Dinkelspiel and Edwards wanted Rothstein to put up approximately $40,000 for the purpose of putting over the deal.

GEORGE N. EDWARDS

Recalled

By Mr. DINKELSPIEL:

The witness was shown and identified the original third report and account filed by him as receiver on the 21st day of September, 1934, amongst the records of the American Can Company v. Golden State Asparagus Company, which report and account was sworn to by said receiver on the 6th day of September, 1934, which said report and account was offered and received in evidence and marked "Plaintiff's Exhibit No. 6". That said exhibit recites therein that said report and account covers the period of the operation by the receiver and his account from March 1, 1933, up to and including February 28, 1934. That no reference is made therein to any dealings with H. Rothstein & Son or any of its members or agents regarding the 1934 asparagus crop belonging to said receivership estate.

The WITNESS: At the date the report (Plaintiff's Exhibit No. 6) was filed, he did not know whether he had a claim against H. Rothstein & Son as he had not disposed of the asparagus that he had on hand and did not know whether the same would be sold at a profit or loss. There was thereupon introduced plaintiff's Exhibit D for identification.

Testimony of

MARTIN J. DINKELSPIEL,

Called As a Witness for the Plaintiff

Martin J. Dinkelspiel, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

By Mr. LENER: [96]

The WITNESS: That he is a member of the firm of Dinkelspiel and Dinkelspiel, Attorneys, and was the attorney for George N. Edwards, as Receiver, during the month of February, 1934, and throughout that entire year. At the conference in his office, on February 19, 1934, the first thing Rothstein said was: "What are we here for? We have got a deal. What are we going to discuss?" Edwards said: "To get this bank guaranty fixed up that you agreed to put up." Rothstein then stated, "what do you mean by your bank guarantee, what kind of a guarantee do you want?" Edwards said, "I want an irrevocable letter of credit or some sufficient bank guaranty that Mr. Dinkelspiel will approve." I said I would have to know the amount of asparagus involved, and I said George that is your business, you know what you are raising up there, I don't know that, how much asparagus is involved? He turned to Mr. Rothstein and said: "What do you think about the amount that is going to be shipped?" Mr. Rothstein said: "Well, what's your idea? Edwards said, "I estimate that we will have 20,000 'bunch pack', and that the culls and loose grass which you are not interested in, are you?" and he said "no"—"about 23,000 crates. Rothstein

(Testimony of Martin J. Dinkelspiel.)

then said, "I guess that's about right." Edwards said "on a 20,000 crate estimate, I ought to have an irrevocable letter of credit for $40,000 so that as shipments are made, I can draw against your bank and be assured of payment. I do not want to take any chances on the tail-end of the deal along in April when the cars start moving—grass moves in large quantities—for you to reject my grass and say you don't want it, because the market is broken, and leave me with the asparagus to get rid of as best I can." Mr. Rothstein said "Do you think I am crazy?" I won't put up any such proposition, my bankers would think I was crazy if I asked him for a $40,000 letter of credit." Then I interrupted him and said "It is not so bad", all you have to do is to arrange with *you* bank that shipments which cover a period of 6 or 7 weeks as [97] they are made, that your bank will agree to pay the drafts as they are presented with shipping documents, and the shipping documents mean that you have accepted so it doesn't mean you have to put up $40,000 in cash or borrow immediately $40,000 in cash—or—I said "—if that isn't satisfactory, arrange with your bank—local bank in either Sacramento or San Francisco—that the local bank will give Mr. Edwards a written guarantee that upon his presentation of a sight draft, accompanied by a Bill of Lading and shipping documents that they would honor that draft without any further question, or call upon Philadelphia, or call upon H. Rothstein & Son. Mr. Rothstein stated he

(Testimony of Martin J. Dinkelspiel.)

wouldn't put up any such proposition at all; that he wasn't interested in putting up any guarantee of that kind. I said "Let's pass that a minute then; and let's see if everything else is understood; "I then took a document which I had on my desk, or in my desk—in a desk drawer; I took this document (Plaintiff's Exhibit 5) which is a contract between George N. Edwards or H. P. Garin and H. Rothstein and Sons, dated February 17, 1931, and I read it over, before Mr. Edwards and Mr. Rothstein, various clauses from this document. Whether I read each and every one, I don't recall. And as I read those clauses which I thought fitted the contract—that is, the telegrams (Plaintiff's Exhibits 2 and 3) which I had on my desk, I checkmarked them in my office, and at the time checked certain ones with checkmark—with a "v" checkmark." He told Rothstein and Edwards that if some compromise on the guaranty could be worked out he could draft up other terms of the contract, and that the only thing that was between them now was the question of the guaranty. In view of the fact that Rothstein had refused to put up a letter of credit or the guaranty, he then suggested to Rothstein would it be possible for him to put up a smaller letter of credit and some sort of a surety bond; that Edwards was not handling his own properties, and was subject to the criticism of [98] creditors and also the Court, and he wants to be fully protected. Rothstein then said he would see if he could get a $5,000 surety bond, and asked if

(Testimony of Martin J. Dinkelspiel.)

he would take it, and he told Rothstein "See if you can get it, and secondly, if you can get it, find out what company is going to write the bond, there are too many of these surety companies that have folded up in the past six months or year, and we want to know the name of the surety company so that we can find something about their rating." Rothstein said that he would wire his office and asked Dinkelspiel to dictate the wire to send to his office, and he dictated this wire (Defendants' Exhibit No. 1). He never heard from any surety company with respect to the bond mentioned in the telegram. He did not see the wire go out. He told Rothstein that he would not permit Edwards to enter into any compromise transaction whereby a lesser guaranty than $40,000 was put up without obtaining the approval of the Court. Rothstein stated he would go to lunch and be back at 1:30 or 2 o'clock. He told Rothstein he would draft up a document and would have something ready for him when he came back, and that the surety would have to be acceptable to the attorneys for the American Can Company and the Golden State Asparagus Company. The conference was resumed at approximately 3:30 at which hour Krasnow and Rothstein came back.

Whereupon, the witness was shown a draft of a contract, which was identified by the witness as being one set of two documents prepared during the noon hour, the first set having had clerical mistakes and imperfections, and this being the final draft.

(Testimony of Martin J. Dinkelspiel.)
Whereupon said document was offered and received in evidence and marked as

PLAINTIFF'S EXHIBIT NO. 7,

reading as follows: [99]

THIS AGREEMENT made and entered into this 19th day of February, 1935, by and between GEORGE N. EDWARDS as Receiver of the GOLDEN STATE ASPARAGUS COMPANY, a California corporation, hereinafter referred to as the "Receiver" and M. H. ROTHSTEIN and H. ROTHSTEIN, co-partners doing business under the firm name and style of H. ROTHSTEIN & SON of Philadelphia, State of Pennsylvania, hereinafter referred to as the "Buyers",

WITNESSETH:

WHEREAS said GEORGE N. EDWARDS is the duly appointed, qualified and acting Receiver of Golden State Asparagus Company, a corporation organized and existing under and by virtue of the laws of the State of California in an action now pending in the District Court of the United States in and for the Northern District of California, Southern Division, entitled American Can Company, a corporation, plaintiff, versus Golden State Asparagus Company, a corporation, defendant, No. 2683-L. In Equity; and

WHEREAS the Receiver is now farming certain acreage consisting of 573 acres more or

(Testimony of Martin J. Dinkelspiel.)

less located on Brannan Island, in the County of Sacramento, State of California, which land is now planted and grown to asparagus; and

WHEREAS the Receiver has agreed to sell, and the buyers have agreed to buy all of the merchantable green shipping bunch packed asparagus grown by the Receiver on said land during the asparagus season of 1934; subject to the approval of this contract by the United States District Court of the Receiver's act in making the agreement herein contained, and a formal order by said court authorizing said Receiver to execute this agreement. [100]

NOW THEREFORE, in consideration of the premises and the mutual agreements herein contained, the parties hereto agree as follows:

1. The Receiver agrees to grow, mature, cut, pack and deliver from said tract of land hereinabove referred to, a first class crop of merchantable green shipping asparagus during the asparagus season of 1934, as hereinafter defined, and the buyers agree to buy and receive from the date hereof up to and including the 10th day of April, 1934, all the merchantable green shipping asparagus grown by the Receiver and bunch packed by the Receiver and to pay therefor $2.00 per crate f. o. b. cars at Isleton, Sacramento County, California.

Payment to be made by the buyers in the following manner: The buyers agree to have their representative or representatives in Cali-

(Testimony of Martin J. Dinkelspiel.)

fornia execute a daily receipt for asparagus delivered as aforesaid, to the Receiver, who shall then draw a draft with accompanying invoice covering said shipment upon the buyers, who agree to immediately establish an irrevocable letter of credit for $5,000.00 at the Bank of California N. A., San Francisco, California, with instructions to honor said drafts accompanied by invoice of the Receiver and receipt of buyers as may be presented from time to time. The buyers further agree at any time upon partial or total exhaustion of said letter of credit and upon notice to that effect from said Receiver and demand upon the part of said Receiver, to renew said letter of credit to the maximum amount of $5,000.00 and agree at all times during the term of this agreement to maintain said letter of credit in an amount satisfactory to said Receiver, but not exceeding the sum of [101] $5,000.00 at any one time.

It is further stipulated and agreed by and between the parties hereto that in the event of the failure of said buyers to so maintain said irrevocable letter of credit, or any renewal or replacement thereof, as herein provided for, or at any time hereinafter up to and including April 10, 1934, to fail or refuse to accept the asparagus tendered them hereunder or issue the receipt to the Receiver as herein provided for, then said Receiver may at his election terminate this Agreement without notice and

(Testimony of Martin J. Dinkelspiel.)

sell his asparagus at the best price obtainable on the open market for either green or canning asparagus, and should the price so obtained by the Receiver be less than $2.00 per crate f. o. b. cars Isleton, said Receiver shall be entitled to and be paid any such difference, plus costs and legal expenses necessitated thereby for its collection, if any, from said buyers or from said surety company hereinafter referred to.

2. The buyers further agree to forthwith deliver to said Receiver a surety bond in the sum of $5,000.00 for the faithful performance of this contract on their part, the acceptance of said bond on the part of the Receiver to be subject, however, to the Receiver's approval of the bond as well as the surety Company writing said bond. In the event of the breach of this contract on the part of the buyers, seller shall have the right to apply as much of the aforesaid $5,000.00 bond as may become necessary toward the liquidation of his damages suffered thereby.

3. The parties hereto agree that all asparagus shipped by the Receiver from and including the 15th day of February, 1934, up to and including the date of this agreement, that the price [102] obtained for such asparagus shall be credited against the price of $2.00 per crate f. o. b. cars Isleton, California, as herein provided for, and should said price received by the Receiver be less than the sum of $2.00 per crate,

(Testimony of Martin J. Dinkelspiel.)

as aforesaid, the said buyers agree to forthwith pay said difference, and should said price received for the asparagus so shipped be in excess of $2.00 per crate f. o. b. cars Isleton, California, the Receiver agrees to allow said buyers to credit said sum against future payments to be made by them and the Receiver hereunder.

4. The Receiver agrees to deliver asparagus under this contract to the buyers in accordance with the kind and quality as defined in the Agricultural Code of California, as the same applies to fresh green shipping asparagus and particularly Sections 781, 788 and 810.5 of said act.

The seller further agrees to deliver said asparagus f. o. b. cars Isleton, California, bunch packed in crates of not less than thirty pounds net in weight.

5. This agreement does not contemplate anything but green shipping asparagus maturing not later than April 9th, 1934, and the buyers are not required to accept any asparagus after April 10, 1934, unless by mutual agreement of the Receiver the buyers agree to accept further deliveries on terms to be also agreed upon.

6. Nothing herein contained shall be construed as personally binding on the said Receiver, George N. Edwards, and it is distinctly understood that this agreement is made and

(Testimony of Martin J. Dinkelspiel.)

entered into by him in his official capacity as such Receiver with the consent of the United States District Court. [103]

This agreement to become binding and effective upon order of the aforesaid court being made and entered in the premises, and the Receiver agrees to furnish a true and correct copy of said Order to the buyers to be attached to their copy of this agreement.

THIS AGREEMENT shall be binding upon the successors and assigns of said Receiver and upon the heirs and personal representatives or assigns of the said Buyers.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed the day and year first above written.

.....

GEORGE N. EDWARDS
as Receiver in equity of
GOLDEN STATE ASPARAGUS COMPANY,
a corporation
H. ROTHSTEIN & SON

By .....

[104]

The WITNESS: When Rothstein and Krasnow returned after luncheon, he told Rothstein they had discussed the question of a surety bond with Walter Fox, attorney for the American Can Company, also Mr. Nielson, former President of the Golden State

(Testimony of Martin J. Dinkelspiel.)

Asparagus Company, and that they would not approve any transaction made with M. H. Rothstein & Sons on a guaranty or surety bond of $5,000.00; that he had taken the liberty of inserting in the agreement an additional provision, providing for a $5,000 surety bond, and also a $5,000 letter of credit, which was to be maintained at not less than $5,000 at the direction of Edwards. Rothstein said he would not sign any deal like that, nor give any surety bond. He asked Rothstein would he put up a $10,000 surety bond and that they could probably make a deal. Rothstein said he would not put up any surety bond, and that they would have to trade with him on his credit, or it was no deal. Edwards said: "Then, I guess we can't trade with you", and they shook hands. He told Rothstein he was sorry he had taken so much of his time, as he regretted losing the time, and Rothstein walked out with Krasnow.

The contract, plaintiff's Exhibit No. 7, was prepared subsequent to the statement by Rothstein that he would not put up a bank guaranty in the amount required by Edwards and that he would not put up an irrevocable letter of credit. Whereupon, the following was read to the witness from the contract, Plaintiff's Exhibit No. 7:

> "Whereas, the receiver is now farming certain acreage consisting of 573 acres more or less, located on Brannan Island, in the County of Sacramento, State of California, which land is now planted and grown to asparagus."

(Testimony of Martin J. Dinkelspiel.)

He recalls the term Brannan Island was used in the discussion during the morning conference. Whereupon, the following was read to the witness from the contract, Plaintiff's Exhibit No. 7:

> "Whereas, the receiver has agreed to sell, and the buyers have agreed to buy all of the merchantable green shipping bunch [105] packed asparagus grown by the receiver on said land during the asparagus season of 1934, subject to the approval of this contract by the United States District Court of the receiver's act in making the agreement herein contained, and a formal order by said Court authorizing said Receiver to execute this agreement." [106]

and the witness was asked whether that paragraph was discussed at the time that the Garin contract was read.

The WITNESS: That was not discussed at the time that the Garin contract was read. There was nothing said about that matter by either Rothstein, Edwards, or himself, except this. He stated in reading the Garin contract where a similar provision was inserted that under the contract as expressed by the telegrams, they thought that it would not be necessary if the bank guaranty was put up. Subsequently, he told Rothstein that they would require for anything less than a 100% guaranty, the approval of the Court, for the protection of the receiver, insofar as any criticism that might subsequently be directed toward him if anything went

(Testimony of Martin J. Dinkelspiel.)

wrong with the deal. Whereupon, the following paragraph from Plaintiff's Exhibit No. 7 was read to the witness, and the witness asked whether it was mentioned in the morning:

> "Payment to be made by the buyers in the following manner: The buyers agree to have their representative or representatives in California execute a daily receipt for asparagus delivered as aforesaid, to the receiver, who shall then draw a draft with accompanying invoice covering said shipment upon the buyers, who agree to immediately establish an irrevocable letter of credit for $5000 at the Bank of California N. A., San Francisco, California, with instructions to honor said drafts accompanied by invoice of the receiver and receipt of buyers as may be presented from time to time. The buyers further agree at any time upon partial or total exhaustion of said letter of credit and upon notice to that effect from said receiver and demand upon the part of said receiver, to renew said letter of credit to the maximum amount of $5000 and agree at all times during the term of this agreement to maintain said letter of credit in an amount satisfactory to said receiver, but not exceeding the sum of $5000 at any one time." [107]

The WITNESS: The provisions of the paragraph were not discussed by the parties in the morning; that in the afternoon he told Rothstein

(Testimony of Martin J. Dinkelspiel.)

he had prepared a draft of an agreement that he thought might be a way out of the difficulty in view of the fact that Rothstein had refused to put up the bank guarantee or irrevocable letter of credit in the amount of $40,000, that inasmuch as Rothstein intimated that he would try and get a $5000 surety bond in order to effect a compromise of the dispute that had arisen, Edwards was anxious to make the deal; that he had considered with other parties interested in the Receivership whose approval they would have to get for any deal of less than 100% guarantee and they had required at least a guarantee of some form of $10,000 and that in view of the fact Rothstein was endeavoring through his Philadelphia office to get *at* $5000 surety bond, he had inserted in the agreement, in order to save time, subject to Rothstein's further approval, a provision for a $5000 irrevocable letter of credit in the terms as outlined in the agreement. Whereupon, the following paragraph of plaintiff's Exhibit No. 7 was read to the witness:

> "It is further stipulated by and between the parties hereto that in the event of the failure of said buyers to so maintain said irrevocable letter of credit, or any renewal or replacement as herein provided for, or at any time hereafter up to and including April 10, 1934, to fail or refuse to accept the asparagus tendered them hereunder or issue the receipt to the receiver as herein provided for, then, said receiver may at his election, terminate this agree-

(Testimony of Martin J. Dinkelspiel.)

ment without notice and sell his asparagus at the best price obtainable on the open market for either green or canning asparagus, and should the price so obtained by the receiver be less than $2.00 per crate f. o. b. cars Isleton, said receiver shall be entitled to and be paid any such difference plus costs and legal expense necessitated thereby for its collection, if any, from said buyers of from said surety company hereinafter referred to." [108]

The WITNESS: The precise provisions of that paragraph were not discussed in the morning. They were discussed in the same manner in the preceding paragraph in the afternoon. However, in the morning, the question of a $5000 surety bond was discussed was brought up by Mr. Rothstein.

Whereupon, the following paragraph from plaintiff's Exhibit No. 7 was read to the witness:

"The buyers further agree to forthwith deliver to said receiver a surety bond in the sum of $5000 for the faithful performance of this contract on their part, the acceptance of said bond on the part of the receiver to be subject, however, to the receiver's approval of the bond as well as the surety company writing said bond. In the event of the breach of this contract on the part of the buyers, sellers shall have the right to apply as much of the aforesaid $5000 bond as may become necessary toward the liquidation of the damages suffered thereby".

(Testimony of Martin J. Dinkelspiel.)

The WITNESS: That was discussed in the morning and also in the afternoon. In the morning, after Rothstein said he would not put up a $40,000 bank guaranty or an irrevocable letter of credit, he asked Rothstein if there was any other basis they could get together on, and he asked Rothstein what about putting up a surety bond. Rothstein said he would see if his firm would put up a $5,000 surety bond. He told Rothstein that any bond he would approve for Edwards would have to be a company that was solvent, and he would want to know the name of the company, and whether the company was doing business in California, so that if they had to sue on a run-out on the deal they would not have to go to Pennsylvania to collect. [109] He told Rothstein to see if he could get one and they would let him know whether they would take it or not. He then dictated the wire. (Defendant's Exhibit No. 1). In the afternoon, he called to Rothstein's attention the provisions of the contract (Plaintiff's Exhibit No. 7) particularly with respect to the irrevocable bank guaranty of $5,000 and the provision regarding the $5000 surety bond. Rothstein said he was not interested in anything like that. Rothstein said he had tendered them a $5000 surety bond in the morning. He asked Rothstein what company is it in and he answered that he did not know, as he had not heard yet. He then told Rothstein that he had not heard from anybody here who might have received a wire from Philadelphia other than Rothstein. He told Rothstein

(Testimony of Martin J. Dinkelspiel.)
that they could not go ahead with any compromise deal unless they had at least $10,000 security up. Rothstein said he would not put up an irrevocable letter of credit, and was not interested in a surety bond; that they could deal with him on his credit. He told Rothstein suppose he put up a $10,000 surety bond in a satisfactory company they could make a deal and conclude the matter, that Edwards would pay the premium on the additional $5000. Rothstein said he would not put up any bond or guarantee, that they could either deal with him in the usual way or no way. Rothstein said that he made contracts for millions of dollars every year by telephone and telegraph, that if they did not want to deal with him the way he usually dealt they did not have to, that as far as he was concerned the deal was off.

The letter addressed to C. J. Carey, Chief [110] of Division, Department of Agriculture, under date of April 26th, 1934, (Defendants' Exhibit No. 2), was written to give a hypothetical case as near as he could about a situation that existed as between Edwards and Rothstein to ascertain whether such a case would be within the jurisdiction of the Department of Agriculture, whether any action could be taken against the firm of H. Rothstein and Son in that connection and for that purpose he ran off the letter without referring to his files and without discussing it personally with Edwards to check up on terms or terminology or detail. It was just to convey the general idea of what had occurred.

(Testimony of Martin J. Dinkelspiel.)

Neither Edwards, nor himself, asked Rothstein to open an account in San Francisco for $40,000 or any lesser sum. Edwards and he asked for a $40,000 irrevocable letter of credit or bank guaranty. Edwards did not, at any time, state that he did not know what a bank guaranty was, or asked Rothstein to explain it to him.

Mr. LENER: On February 19, what did Mr. Edwards say, if anything, when Mr. Rothstein refused to put up a bank guarantee satisfactory to him: that is to say, a bank guarantee covering a 100 per cent security.

The WITNESS: Mr. Edwards said "You have agreed to do that. I am surprised that you are running out now. You wired me that you would do it, and I would like very much to make a deal. My asparagus is moving, and if we could make any other kind of a deal that is satisfactory, I would like to make it. I don't want to drop the thing entirely.

Mr. TORREGANO: I ask that the answer go out, as the answer tends to vary the terms of a written document in evidence.

The COURT: Objection overruled.

Mr. TORREGANO: Exception.

Mr. LENER: On that day, Mr. Dinkelspiel, was there any discussion or conversation had with reference to the telegrams [111] in this case as a contract? If so, please give the conversation.

Mr. TORREGANO: We object to that on the ground that it calls for the conclusion and opinion of the witness.

(Testimony of Martin J. Dinkelspiel.)

The COURT: I will allow the question.

Mr. TORREGANO: We note an exception.

The WITNESS: Well, as I have stated heretofore—I just stated—after the refusal of Mr. Rothstein to put up a guarantee called for by Mr. Edwards and Mr. Edwards referred to those telegrams as a deal. Mr. Rothstein said, "I know it, but I am not going to put up any bank guarantee. I am not interested in a $40,000 bank guarantee; I won't go through with the deal. As Mr. Rothstein was leaving the conference in the afternoon, he said to Edwards, "What are you going to do with your asparagus, Mr. Edwards?" Edwards said: "Well, I don't know. I have not made up my mind yet. I guess as long as you won't take it I will have to consign it." Rothstein said: "Will you consign it to us?" Edwards said: "No, if I consign to anybody I will consign it to Roper. I have dealt with him before, and I am satisfied he gets me the best prices. The letter addressed to Carey (Defendants' Exhibit No. 2) was not the only letter he wrote in regard to the transaction between Edwards and Rothstein. On June 19, 1934, he wrote to the defendants' attorney.

Cross-Examination

By Mr. TORREGANO:

The attention of the witness was called to the letter dated May 11, 1934, addressed to the defendants (Defendants' Exhibit C for identification), and was identified by the witness as having been sent by him.

(Testimony of Martin J. Dinkelspiel.)

Mr. TORREGANO: I now introduce in evidence Defendants' Exhibit "C" for Identification as Defendants' Exhibit next in order.

Mr. LENER: At this time, if your Honor please, I will object to the introduction of the letter on the ground it [112] was simply an attempt to effect a compromise,—a compromise that failed; and as incompetent, irrelevant and immaterial.

Mr. TORREGANO: The letter speaks for itself.

(Discussion)

The COURT: I will sustain the objection.

Mr. TORREGANO: Note an exception.

The WITNESS: When Edwards told him he wanted a written contract, he told Edwards that he did not want to duplicate the work, to wait until Rothstein arrived, so if there was anything Rothstein wanted different or anything in connection with the bank guaranty, whether an irrevocable letter of credit, or whether a direct guaranty by a local bank, he would not have to redraft the agreement; that it would only take a few moments to reduce it to a written contract; Edwards was going to give Rothstein his choice of an irrevocable letter of credit for $40,000 or an out-right guaranty for $40,000 through a local bank. Edwards never told him that Rothstein had agreed to put up a $40,000 bank guaranty or any other specified amount. Edwards did tell him that Rothstein had agreed to a bank guaranty satisfactory to Edwards.

The drafting of the document (Plaintiff's Exhibit 7) did not dispose of all the controversy or

(Testimony of Martin J. Dinkelspiel.)

all the discussion that occurred during the morning session of the conference. He prepared the document to endeavor to effect a compromise between Edwards and Rothstein, and he was prepared to have Edwards sign the document. The thing that was not definitely disposed of in the morning conference was the question of guaranty. At the time Edwards requested him to pre- [113] pare a contract, he did not know the amount that was to be inserted. He does not recall that Rothstein asked anything about having the contract written up. It was assumed by all parties at the conference that they were there to draw up a written contract. He don't know what they might be in the office for except to have a contract of sorts drawn up or a paper drawn up that would memorialize these telegrams (Plaintiff's Exhibits 2 and 3). He had been apprised by both sides in the conversation in his office that they wanted the terminology used in the telegrams put in some formal document. Edwards wanted a written contract because he wanted a complete record of his transactions for the purpose of any inquiry by any creditor or interested party in the receivership estate. When he had the Garin Contract in front of him Rothstein had already refused to put up a bank guaranty.

When Rothstein asked Edwards at the conference what he was there for, Edwards said that he wanted to get the details of the bank guaranty straightened out as called for in his telegram (Plaintiff's Exhibit No. 2) and Rothstein's answer (Plaintiff's

(Testimony of Martin J. Dinkelspiel.)

Exhibit No. 3). He told Edwards and Rothstein that before speaking about the guaranty he thought Edwards had better ascertain the extent of his crop and see the extent of the guaranty. Mr. Edwards said he estimated that he will ship about 20,000 crates of bunch grass. Mr. Rothstein said that it was a fair estimate. Mr. Edwards then stated that they would have some other grass, that isn't covered in the deal, and that Rothstein was not interested in, some culls, probably a couple of thousand or so crates, or words to that effect. Mr. Edwards said that on that basis he would want a $40,000 bank guaranty or an irrevocable letter of credit. Edwards said he would leave the question of guaranty up to him in large parts. The telegram (Plaintiff's Exhibit No. 3) is the only writing that he knows of that exists whereby he was to fix the amount of the bank guaranty between [114] Edwards and Rothstein. Edwards said it was up to him to determine what would be the satisfactory bank guaranty. When he told Rothstein the provisions of the contract (Plaintiff's Exhibit No. 7) as to the guaranty, $5000 letter of credit and the $5000 surety bond, Rothstein tossed the contract on his desk and said he was not interested in any deal. The paragraph referring to the guaranty was not discussed with Rothstein in the morning conference. The conference in the afternoon lasted probably 20 minutes or half an hour. [115]

GEORGE N. EDWARDS,

Recalled

By Mr. DINKELSPIEL:

The Witness was shown certain yellow pages, bound with string and asked whether he knew what they were.

The WITNESS: They are my permanent records of the sales made by my agents for asparagus shipped during the season 1934.

Mr. TORREGANO: I object to that, if your Honor please and move to strike it out on the ground that it is hearsay as to the defendant.

The COURT: Same will be denied.

Mr. TORREGANO: Exception.

The WITNESS: The records are in his handwriting and are his permanent records. The entries were made at the time the asparagus was shipped and at the time he received payment. They are made right along from day to day. They are regularly kept records, whereupon the said documents were offered in evidence as the permanent records of Edwards, as Receiver, covering asparagus shipments and sales in the year 1934. Upon objection of the defendants, permission to cross-examine the Witness was granted by the Court.

Cross-Examination

By Mr. TORREGANO:

The WITNESS: The papers are written in pencil. When the asparagus was shipped by Roper, his agent, Roper notified him each day that it was

(Testimony of George N. Edwards.)

shipped, and to whom, and he made a record of it as he received the notices from Roper. When the selling agent sold the goods and rendered him [116] an account of sales, showing the amount of money obtained for each individual shipment, he recorded it.

Whereupon, the witness was shown one of the sheets showing an account with John Nix & Company, New York, and the witness was asked where he obtained the data.

The WITNESS: Part of it from Roper, and part of it from Nix. He shipped to Nix & Company, New York, through H. Roper & Company. Roper sent him a statement showing how many crates went to Nix.

When the goods are sold by the agent in the East, the agent makes up an account of sales which contains the same car number that Roper gave him when the shipment was made and also shows the number of crates and the grade sold and the price. The agent deducts the freight, the commissions or any charges that he pays out on the other end and sends him a check for the balance, together with the account sales. None of the transactions of the agent in the East was done while he was present. He is not able to state whether or not the return made by the agent in the East had been checked up by him or anyone else acting for him in the East. When the cars roll to place in the East and are sold the remittance is sent to him. He does not know whether Roper takes any remuneration. He does not give Roper anything out of the sale.

(Testimony of George N. Edwards.)

All of the asparagus was shipped through Roper to the different agents whose names appear on the sheets. When the agents sold the goods they sent an account sales, showing what each grade was sold for, and they deducted all charges against those goods, sending him a check for the net results. The gross sales, less the charges, which consist of freight, [117] sometimes cartage, pre-cooling and commissions, and the net shows the balance. He has no written agreement with Roper. Roper consigns the asparagus to the different parties in the East, wherever he thinks the market will be the best at the time the car arrives there for sale. It is his understanding that part of the commission deducted by the agent in the East is sent to Roper. The same situation applies to all of the accounts, with one exception, the Atlantic Commission Company. The account represents the cash sales at Isleton to the Company.

He makes some of the original records of his transactions, pertaining to the administration of the estate, in pencil.

Mr. TORREGANO: Tell us those that you make in pen and ink, and tell us those that you make in pencil, in connection with the administration of this estate.

Mr. DINKELSPIEL: I submit that it is immaterial, if the Court please and incompetent.

The COURT: I will allow the question.

The WITNESS: Well, I make such records as I have given you here, in pencil. Those—whatever the amount of cash I actually receive on the—on the—

(Testimony of George N. Edwards.)

shows on the outside column; and that is entered in ink rather than in my permanent records.

Mr. TORREGANO: Where is that permanent record showing the amounts put in in pen and ink, received from the sale of the asparagus.

The WITNESS: In my office. [118]

Mr. TORREGANO: Will you please produce them?

The WITNESS: I can produce them if I have time to do it.

Mr. TORREGANO: We now object. We make the further objection, if your Honor please. It now affirmatively appears, from the witness's testimony, that these are not permanent records of the administration of the estate showing the moneys received in the sale of this asparagus.

Rebuttal

By Mr. DINKELSPIEL:

Mr. DINKELSPIEL: Other than these 16 sheets, have you any other permanent record of the amount of asparagus shipped in the 1934 season, to whom shipped, which also has the net returns?

Mr. TORREGANO: We object on the ground it is incompetent, irrelevant and immaterial. The question before the Court is whether or not these are the permanent records showing the money received from the sale of the asparagus—pen and ink.

The COURT: I will allow the question.

Mr. TORREGANO: Exception.

The WITNESS: Yes.

Mr. DINKELSPIEL: What record?

(Testimony of George N. Edwards.)

The WITNESS: Well, I have the account of sales that I receive from the different agents, which I also keep as permanent records. I file them all and keep them. I have them for every year I have been there. I file each year separate, and at the end of the year I take all the accounts of sales, and advices I receive from Mr. Roper as to shipments, and balance them all up. [119]

Mr. TORREGANO: We object to that as hearsay and not binding on the defendants.

The COURT: I think we have a right to know just how he conducts his books. That is the investigation.

Mr. TORREGANO: But not what Mr. Roper tells him.

The COURT: Proceed to tell about the method of bookkeeping.

Mr. TORREGANO: We note an exception.

The WITNESS: I keep the original records I receive. Those I receive from Mr. Roper——

The COURT: (interrupting) The communications you receive from Mr. Roper and these account sales you keep?

The WITNESS: Yes.

The COURT: After you receive them, is *then* any entry on these sheets?

The WITNESS: Yes.

The COURT: In other words, no other records are kept save the original communications?

The WITNESS: Yes.

The COURT: What do you call this book—your account book, or what?

(Testimony of George N. Edwards.)

The WITNESS: I just call it 1934 Asparagus Sales.

Mr. DINKELSPIEL: Then, is there any other book of record in which you make entries besides this, and besides filing away the letters which you receive from Mr. Roper or these various checks throughout the season?

The WITNESS: One for the cash.

Mr. DINKELSPIEL: One for the cash?

The WITNESS: Yes.

Mr. DINKELSPIEL: And after you make this entry in the cash-book?

The WITNESS: (interrupting) After I make the entry, I turn it over to the bookkeeper and he enters it. [120]

Mr. DINKELSPIEL: Put under "Cash"?

The WITNESS: Yes.

Mr. DINKELSPIEL: And that is the complete record of all transactions?

The WITNESS: Yes, sir.

Mr. DINKELSPIEL: In other words, the cash-book should disclose, if properly kept, and your records here, every transaction you have in connection with these shipments?

The WITNESS: Yes, sir.

Cross-Examination

By Mr. TORREGANO:

Mr. TORREGANO: You stated, as I understand, the moneys received from the sales of the asparagus are reflected in the records kept by you as receiver of the Golden State Asparagus [121] Company in

(Testimony of George N. Edwards.)

some book other than these papers here; is that correct?

The WITNESS: Yes, sir.

Mr. TORREGANO: And that book is kept in pen and ink; is that correct?

The WITNESS: Yes, sir.

Mr. TORREGANO: And over what period of time did you make your different records?

The WITNESS: Well, I would have to see the dates.

Mr. TORREGANO: I will refresh your memory from the dates.

The WITNESS: I would say it covered the period from February 16th to April 5th, to the best of my recollection.

Mr. TORREGANO: Were they prepared during that period of time or prepared recently, for the purpose of exhibiting to the Court and jury?

The WITNESS: Daily; each day.

Mr. TORREGANO: You are sure about that, notwithstanding the appearance of the paper, as you receive information about each car or what money was being transmitted to you, you went to these records and put down in your own handwriting the name, the number of the car, the date that it was shipped, the number of crates of asparagus and the loose crates, if any, the day when the net proceeds were received and the amount of the net proceeds?

The WITNESS: Yes.

Mr. TORREGANO: That is done each day?

(Testimony of George N. Edwards.)

The WITNESS: Yes. [122]

Mr. TORREGANO: Do you use the same pencil?

The WITNESS: I don't know.

Mr. TORREGANO: Look at the paper, Mr. Edwards, and tell us.

The WITNESS: I couldn't tell you that, but the fact is he made those entries daily. He had them in a folder, a loose leaf folder. His bookeeper did not make the entries because he wanted to keep track of these sales, and he checked them up each day. At the time he was getting these sales, he was also getting a government report daily showing the sales made in the different markets, and he wanted to keep track and see that he was getting a proper price for his goods.

Examination

By Mr. DINKELSPIEL:

Mr. DINKELSPIEL: Yes, I will now offer these 16 pages identified by the witness, as plaintiff's next in order.

Mr. TORREGANO: To which we object on the ground that they are hearsay and incompetent, irrelevant and immaterial to prove any of the issues in this case, and upon the further ground that they are not the best evidence, and it affirmatively appears from the witness's testimony, that these are not books of permanent record.

The COURT: Objection overruled. They will be received as Plaintiff's 8 in evidence.

Mr. TORREGANO: We note an exception.

(Testimony of George N. Edwards.)

Said

PLAINTIFF'S EXHIBIT No. 8

reads as follows: [123]

1934

Frgt—Ref—Ctg .87

Asp. Shipments to JNO NIX & CO. NEW YORK

Date Shipped	Car Numbers		Date Shipped	Bunched Crates	Loose Crates	Net Proceeds Date	Net Proceeds Amt.
	Express		2/16	9		2/23	26.84
	P.F.E. 712		2/21	24		2/23	40.98
	Penn 2637		2/22	16		2/28	37.76
	P.F.E. 5302		2/24	14		3/5	41.58
	Penn 2791		2/24	9		3/1	21.06
Express	P.F.E. 799		2/24	20		2/28	34.97
	" 17598		2/27	14		3/14	40.23
	" 31771		2/28	17		3/15	45.34
	" 26246		3/1	74		3/16	172.13
	" 35628		3/3	87		3/16	211.51
	" 29961		3/4	181		3/16	373.36
	" 72032		3/5	164		3/16	343.72
	" 10397		3/6	149		3/16	295.45
	" 3627		3/7	208		3/17	407.83
	" 30595		3/9	49		3/19	104.80
	" 20245		3/12	249		3/22	454.55
	" 274		3/14	265		3/28	409.70
	" 33171		3/15	278		3/29	334.35
	" 38316		3/16	243		4/10	309.65Stg
	" 29386		3/17	181		3/29	208.58
	" "	Gil	"	21		3/29	29.74
	" 33680		3/18	110		4/11	129.85
	" "	Gil	"	63		4/11	60.08
	" 31390		3/19	110		3/31	143.58
	" "	Gil	3/19	63		3/31	70.95
	" 37685		3/20	167	To Chicago		
	" "	Gil	"	50	"		
	" 29393		3/21	219		4/9	270.25
	" "	Gil	"	69		4/9	79.85
	" 36143		"	63		4/2	71.40

(Testimony of George N. Edwards.)

Shipped Date	Numbers Car		Shipped Date	Crates Bunched	Crates Loose	Date Net Proceeds	Amt.
	P.F.E.27390		3/22	166	Albany		To Albany
	" "	Gil	"	58	"		"
	" 11338		3/23	169	Boston		To Boston
	" "	Gil	3/23	55	Boston		"
	" 203		3/24	134		4/4	152.22
	" 17401		3/24	77		4/5	98.19
	" 203	Gil	3/24	67		4/4	75.44
	" 20547		3/25	150		4/6	176.23
	" "	Gil	"	48		4/6	56.58
	" 20654		3/26	165		4/14	197.80
	" "		"	66		4/14	74.12
	" 50051		3/27	136		4/12	167.82 Wilkinson
	" "	Gil	3/27	33		4/12	48.22 Wilkinson
	" 28406		3/30	127		4/12	167.34
	" "	Gil	3/20	57		4/12	81.97
	" 19051	Roper	3/9	195		3/22	327.43
	" 33272	"	3/30	72		4/15	99.45

[124]

Frgt—Ref—Ctg .70

1934

Asp. Shipments to MERKEL BROS. CHICAGO

	Car Number		Date	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
	M.P. 3430		2/22	14	10	3/1	43.16	29.31
	P.F.E.15866		2/24	39		3/6	90.27	
Express	P.F.E. 799	x	2/24	10	10	3/1	34.74	22.66
	P.F.E. 1965		2/26	73		3/6	195.09	
	" 5955		2/26	46		3/9	135.62	
	" 31846		3/1	51	47	3/13	240.44	141.23
	" 23768		3/4	83	40	3/15	230.96	157.49
	" 71296		3/5	50	25	3/15	125.68	86.40
	" 16262		3/6	131		3/17	233.31	

(Testimony of George N. Edwards.)

Car Number			Date	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
P.F.E.	32150		3/7	50	50	3/20	145.72	77.48
"	32359		3/9	76	90	3/20	258.40	142.55
"	35876		3/10	75		3/20	131.64	
"	21610		3/11	125	73	3/21	317.73	228.23
"	6031		3/12	150	100	3/21	368.55	253.64
"	19324		3/13	60	68	3/22	165.57	92.90
"	27614		3/14	100	63	3/26	173.21	112.71
"	22134		3/15	96	75	3/27	173.03	107.21
"	10979		3/16	100	50	3/27	153.05	114.87
"	29413		3/16	210	200	3/30	406.57	269.57
"	31855		3/17	45	50	3/30	80.41	45.17
"	32866		3/19	75	23	To Milwaukee		
"	18544		3/19	59		4/3	87.22	
"	2102		3/20	100		4/3	130.83	
"	51536		3/21	144	75	4/4	240.56	188.39
"	—8—		3/23	100	160	4/7	252.60	138.33
"	70124		3/23	53	120	4/7	168.45	77.55
"	"		3/23	45		4/7	59.84	
"	7696		3/24	147	75	4/7	266.03	211.33
"	14775		3/25	135		4/9	186.37	
"	"		3/25	52		4/9	79.60	
"	71687		3/26	95	50	4/10	173.17	126.43
"	37685	(NY)	3/21	167		4/6	254.22	
"	"	Gil	"	59		4/6	91.36	
"	25200		3/27	70	50	4/6	150.71	107.60
"	"	Gil	3/27	41		4/11	56.27	
"	14246		3/28	70		4/11	107.02	
"	30044		3/29	42		4/14	64.01	
"	11268	Roper	3/15	192	72	3/27	401.51	319.38
"	71385	"	3/28	244		4/12	376.27	
Gil "	"	"	3/28	80		4/12	122.96	
"	18965	"	3/21	263	156	4/4	476.97	373.33
Gil "	"	"	"	31		4/4	44.49	
"	22181	"	3/30	42		4/17	72.69	
Gil "	"	"	"	45		"	77.87	
				3860 Bunched			6021.11	

(Testimony of George N. Edwards.)

1934

Asp. Shipped to LA MANTIO BROS. CHICAGO

Date Shipp.	Car Numbers	Date Shipped	Bunched Crates	Loose Crates	Net Proceeds Date	Amt.	Bunched
	Express	2/16		5	2/21	13.59	
	P.F.E. 712	2/21	10	10	3/1	26.36	19.00
			10 Bunched			19.00	
		JNO NIX & CO.					
	P.F.E.19051	3/9Roper195			2/22	327.43	
			4479 Bunched			6820.28	
		ATLANTIC COMMISSION CO.					
	Cash sales	3/29	275		3/29	412.50	
	"	3/31	304		4/3	419.75	
	"	4/1	406		4/3	565.75	
	"	4/2	432		4/3	602.15	
	"	4/3	415		4/6	577.00	
	"	4/4	342		4/6	478.00	
	"	4/5	474		4/6	653.15	
			2648			3708.30	

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(Testimony of George N. Edwards.)

Frgt & Ref. .20

1934

Asp. Shipped to W. A. BEASLEY & CO. LOS ANGELES

Date Ship	Car Numbers	Date Shipped	Bunched Crates	Loose Crates	Net Proceeds Date	Net Proceeds Amt.	Avg. Per Crate
	Express	2/21		12	3/4	29.21	
	"	2/22		6	"	13.65	
	"	2/24		29	"	76.54	
	"	2/26		56	2/28	109.28	
	"	2/27		52	3/1	92.46	
	"	2/28		60	3/2	109.39	
	"	3/1		17	3/3	31.85	
	"	3/2		30	3/5	40.64	
	"	3/3		64	3/5	44.80	
	"	3/4		29	3/6	38.91	
	P.F.E.20088	"		111	3/7	137.93	
	" 21291	3/5		88	3/8	114.67	
	Express	3/5		20	3/7	23.79	
	P.F.E. 9956	3/6		97	3/9	130.34	
	" 23581	3/7		80	3/10	97.27	
	" 11356	3/9		152	3/12	161.52	
	" 32217	3/10		100	3/14	110.82	
	" 33244	3/12		185	3/14	213.54	
	" 8687	3/15		155	3/19	161.14	
	" 50092	3/17		240	3/28	216.41	
	" 30857	3/19		202	3/23	126.77	
	" 24654	3/22		90	3/27	55.86	
	" 29122	3/24		53	3/29	32.72	
	" 19512	3/25		60	3/31	33.64	
	" 30880	3/29		39	4/2	23.63	

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(Testimony of George N. Edwards.)

1934

Asparagus to ALTMAN & SWARTZ BUFFALO

Car Number	Date	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
P.F.E. 26310	2/28	11		3/9	38.52	
" 30794	3/7	39		3/20	51.65	
" 18842	3/10	196		3/22	266.97	
" 9653	3/21	132	100	4/5	250.25	156.35
" "	"	41		4/5	47.74	
" 32577 Roper	3/13	268	120	3/27	561.42	433.47
		655.13÷519=1.25 per crate avg.				
		687 Bunched			989.70	

[128]

1934

Ship to THE MEYER WEIL CO. CLEVELAND

Car Number	Date	Bunched	Loose	Net Proceeds Date	Amt.
P.F.E. 26310	3/28	23)	42 crates	3/12	161.00
" "	"	30)	11 Buffalo		
" 37991	3/8	187	To Boston		
" 32178	3/13	190		3/26	350.24
		419 Bunched			511.24

[129]

1934

Asp. Shipped to L. SINGE & SONS & CO. KANSAS CITY

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
F.E. 913	3/2	75	66	3/24	247.38	135.75
		75 Bunched			135.75	

[130]

(Testimony of George N. Edwards.)

1934

Asp. Shipped to JOHN AIEOLLO BROS. CORP. ALBANY N. Y.

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Amt.	
P.F.E. 13679	3/2	72		3/19	126.49	
" 27390	3/22	166		4/6	231.47	From Nix
" "	3/22	Gil 58		4/16	80.81	
		296			438.77	
		438.77÷296=1.49 avg per crate				
		296 Bunched			438.77	**[131]**

1934

Asp. Shipped EDWARD READ & SON DETROIT

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Amt.	Bunched
P.F.E.19263	3/3	128	39	3/16	323.02	268.70
" 12178	3/6	50	75	3/17	200.26	95.78
" 14829	3/8	103	50	3/19	254.00	188.49
" 27362	3/10		60	3/22	67.36	
" 29907	3/14		162	3/24	203.15	
" 52269	3/16	162		4/3	195.67	
" 15049	3/17	50	57	4/4	104.27	57.41
" " Gil	"	25		4/4	29.91	
" 27904	3/21	100	86	4/9	173.84	117.84
" 10933	3/22	105		4/10	128.40	
" " Gil	"	42		4/10	51.80	
" 19934	3/24		75	4/9	63.86	
" 18576 Gil	3/25	33		4/7	40.02	
" 27948	3/26	90	60	4/17	173.32	121.05
" " Gil	"	34		4/7	46.71	
" 5682	3/27	71		4/18	100.50	
" " Gil	"	26		4/18	37.24	
" 6861 Roper	3/19	220		4/6	245.23	
Gil " " "	3/19	37		4/4	46.95	
" 51672 "	3/20		175	4/2	137.55	
Gil " " "	3/20		12	4/2	12.00	
" 8039 "	3/25		198	4/16	199.86	
" 52559 "	3/27		159	4/18	155.78	
" 12606 "	3/29		14	4/19	19.55	
" 50058 "	3/30		63	4/20	66.48	
		1176 Bunched			1771.70	

(Testimony of George N. Edwards.)

1934

Asp. Shipped to H. B. FISKE & CO. PROVIDENCE

Car Number	Date Shipped	Bunched Pack	Loose Pack	Net Proceeds Date	Net Proceeds Amt.
P.F.E. 37285	3/6	49		3/22	97.71

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1934

Shipped to FRUIT SUPPLY CO. ST. LOUIS

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Net Proceeds Amt.
P.F.E. 52763	3/11	152		3/31	186.21

[134]

1934

Shipped to E. R. GODFREY & SONS CO. MILWAUKEE

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Net Proceeds Amt.	
P.F.E. 50115	3/13	171	44	7/4	321.51	262.75
P.F.E. 32866 (Chicago)	3/19	75	23	4/10	128.03	105.92
						378.67
		246 Bunched			378.67	592.

[135]

1934

Shipped to CHAS. BASCH & CO. HARTFORD, CONN.

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Net Proceeds Amt.
F.E. 1729	3/15	173		3/28	354.57

[136]

(Testimony of George N. Edwards.)

1934

Shipped to LORD & SPENCER BOSTON

Car Number			Date Shipped	Crates Bunched	Crates Loose	Net Proceeds Date	Net Proceeds Amt.
	P.F.E. 37991		3/8	187		3/19	336.60
	" 19097		3/18	45		3/30	52.18
	" "		3/18	Gil 49		3/3	45.80
	" 11338		3/23	169		4/6	221.84
	" "		"	Gil 55		4/6	69.10
	" 51236	Roper	3/17	166		3/30	201.82
Gil	" "	"	"	54		3/30	65.42
	" 4603	"	3/28	60		4/8	88.10
	" "	"	"	13		4/8	21.64
				798 Bunched			1102.50

C. H. ROBINSON

P.F.E. 4433	Roper	3/18	93		4/2	112.34

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1934

Shipped to H. D. ROPER CHICAGO

Car Number		Date Shipped	Bunched	Loose	Net Proceeds Date	Net Proceeds Amt.	Sold by
6							
P.F.E. 19051		3/9	195		3/22	327.43	Nix
" 32577		3/13	268	120	3/27	561.42	Buffalo A&W
" 11268		3/15	192	72	3/27	401.51	Chicago
" 51236		3/17	166		3/30	201.82	Boston
" "	Gil	3/17	54		3/30	65.42	"
" 4433		3/18	93		4/2	112.34	Denver
" 6831		3/19	220		4/6	245.23	Detroit
" "		3/19	37		4/4	46.95	"
" 51672		3/20		175	4/2	137.55	Detroit
" "	Gil	"		12	4/2	12.00	
" 18965		3/21	263	156	4/4	476.97	Michel Chicago
" "	Gil	"	31		4/4	44.49	"
' 8038		3/25		198	4/16	199.86	Detroit

(Testimony of George N. Edwards.)

Car Number	Date Shipped	Bunched	Loose	Net Proceeds Date	Amt.	Sold by
P.F.E. 52559	3/27		159	4/18	155.78	Detroit
" 4603	3/28	60		4/8	88.10	Boston
" " Gil	"	13		4/8	21.64	"
" 71385	3/28	244		4/12	376.27	Chicago
" " Gil	3/28	80		4/12	122.96	Chicago
" 12606	3/29		14	4/19	19.55	Detroit
" 22181	3/30	42		4/17	72.69	
" " Gil		45		4/17	77.87	Chicago
" 33272	3/30	38)	72	4/13	52.70) 99.45	New York
" " Gil	"	34)		4/13	46.75)	
" 50058	3/30		63	4/20	66.48	Detroit

[138]

The WITNESS: At the time he made the entries in Plaintiff's Exhibit No. 8 and in particular the entries having to do with the net receipts, he made inquiry to ascertain the market price in which the goods were sold on the date of sale.

Mr. DINKELSPIEL: Will you state what inquiry you made in that connection?

The WITNESS: During the period I am shipping asparagus I receive bulletins from the Department of Agriculture, showing the sales made in the different markets on the different days, and as I get these reports of sales I refer to this bulletin to see whether my agents are getting the average price as compared with the price recorded by the Department of Agriculture.

Mr. TORREGANO: We move to strike that out as hearsay and not binding on the defendants; and

(Testimony of George N. Edwards.)

we make the further objection to strike the entire answer on the ground it is not the best evidence; and we now ask your Honor to instruct the witness to produce in court tomorrow morning the Government reports testified to by him which he daily received, and on which he is now testifying:

The COURT: That is a little different issue; but I will deny the motion to strike it out.

Mr. TORREGANO: Note an exception.

The WITNESS: The group of papers shown him are the "Federal State Market News Service". He obtained them daily, in his business of operating the Golden Gate Asparagus Company from the United States Department of Agriculture, Bureau of Agricultural Economics, Ferry Building, San Francisco, California. The reports in his hands are duplicates obtained at the San Francisco office of the Department of Agriculture.

Mr. DINKELSPIEL: Will you please state under what circumstances you obtained those duplicates.

Mr. TORREGANO: I object as incompetent, irrelevant and immaterial. [139]

The COURT: I will allow the question.

Mr. TORREGANO: Exception.

The WITNESS: He went to the office and told them he wanted duplicates of the reports that had been sent out during the year from February 16, 1934, till April, 1934, of the sales of asparagus in the principal markets * * * eastern markets of the

(Testimony of George N. Edwards.)

United States and these are the papers they handed him. He looked at the papers before coming to court and they are similar reports to those which he received in the year 1934. He compared his returns of sale in the various markets insofar as he was able with the figures shown on the original reports that he received from the Department of Agriculture.

Mr. DINKELSPIEL: And did that comparison from day to day that you made with the United States Reports—or Department of Agriculture Reports show as to the prices that you were being paid for your asparagus in the various markets where it was being sold?

Mr. TORREGANO: Just a minute. I object to that as calling for the conclusion and opinion of the witness; and the report is the best evidence.

Mr. DINKELSPIEL: I am asking not for a conclusion. I am asking for a fact.

The COURT: You are asking him: did he compare the two?

Mr. DINKELPSIEL: I am asking what the reports showed in comparison to the prices received.

The COURT: That's a comparison.

Mr. DINKELSPIEL: Received by him.

The COURT: I will allow the question.

Mr. TORREGANO: Exception.

The WITNESS: The reports showed the prices was receiving were in line with the prices mentioned on these reports.

(Testimony of George N. Edwards.)

Mr. TORREGANO: I object to that and move to strike it out on the ground it is expressing the opinion and conclusion of the [140] witness.

The COURT: Overruled.

Mr. TORREGANO: I note an exception. [141]

Mr. DINKELSPIEL: We will now offer this set of papers headed: "Federal-State Market News Service, United States Department of Agriculture, Bureau of Agricultural Economics, Room 1, Ferry Building, San Francisco, California, Department Market Information Service, Telephone Exbrook 6317-18"; and headed by sheet dated "Monday, February 26, 1934", in evidence as plaintiff's exhibit number 9, I believe it is.

Mr. TORREGANO: To which we object on the ground that they are incompetent, irrelevant and immaterial, and not the best evidence, as it affirmatively shows these documents presented to the court were not certified documents as required under the law.

The COURT: I will take the submission under advisement.

Mr. DINKELSPIEL: We will offer these for identification.

The COURT: They will be received that way. I presume they are offered in evidence, but I have not passed on that.

Mr. DINKELSPIEL: Yes.

The COURT: They will be marked Plaintiff's Exhibit "E" for Identification.

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: Q. Mr. Edwards, I am going to show you Plaintiff's Exhibit No. 8, being the records of your asparagus sales, and I am going to ask you if you have totaled from those records the total amount of what you received during the 1934 season for bunch grass sold by you,—from this record?

Mr. TORREGANO: We object to that, if your Honor please, on the ground it is hearsay as to these defendants, and not binding on them, and it is incompetent, irrelevant and immaterial.

The COURT: I will overrule the objection.

Mr. TORREGANO: Exception.

The WITNESS: Yes.

Mr. DINKELSPIEL: What does that total amount of sales of [142] bunch grass, between the dates of February 16th and April 10th, 1934, made by you, amount to?

Mr. TORREGANO: We will object to that on the ground it assumes something not in evidence, and we object to the form of the question.

The COURT: Overruled.

Mr. TORREGANO: Exception.

The WITNESS: $22,547.85.

Mr. TORREGANO: Let me have that figure again.

The COURT: Read it.

The WITNESS: $22,547.85.

Mr. DINKELSPIEL: Mr. Edwards, can you state whether or not you have totaled the number of

(Testimony of George N. Edwards.)

cars of bunch pack asparagus, from those original records that you have in your hand there, sold by you between the dates of February 16th and April 10th, 1934?

Mr. TORREGANO: We object to the form of the question upon the ground it assumes something not in evidence, is incompetent, irrelevant and immaterial, and not binding on these defendants.

The COURT: Overruled.

Mr. TORREGANO: We note an exception.

The WITNESS: I have.

Mr. DINKELSPIEL: And what is the number of cars?

The WITNESS: 15,161. [143]

Whereupon leave to cross-examine the witness was given.

By Mr. TORREGANO:

The WITNESS: He has had business relations with commission merchants back East by which he paid them commissions over a period of 30 years. The commissions fluctuate, he means they fluctuate from one commodity to another, and a man might make a special deal with some commission merchants for a different price. The transaction with Roper was the customary one, the customary method is for a local grower to pack his asparagus on the ranch—all the grades to a shipper of the type of Roper, or what are termed "local consignee", who distributes it throughout the East to his different connections. He ascertained the custo-

(Testimony of George N. Edwards.)

mary commission being paid in 1934 by consulting a number of men in the same line of business as Roper. He don't recall all of them. One of them was the Riverside Sales Company. Another was an outfit at Antioch. These concerns wanted to secure the sale of the asparagus. He supposed there were a thousand came to him at different times in the season and asked him to ship the goods to them. They told him the commissions they would charge, and in other cases they didn't. He made inquiries from Eastern commission men to ascertain what the customary commission charge was to be paid eastern commission merchants. Nix in New York and Merkle Bros. in Chicago told him the customary commission charge was 10%. He paid 10% commission. He has no personal interest in the outcome of the case. It is nothing to him personally in the way of remuneration whether he wins the case or not. He is simply protecting the interests of the creditors as far as he knows. His compensation is fixed by the court on a monthly basis, and this means a little more work for him to have this case on. He had a telephone conversation with Krasnow on Saturday morning, October 26, 1935, and Krasnow said that he did not recall the meeting at Isleton with Rothstein, the length of time taken up at the meeting, [144] the price Edwards had offered to sell the asparagus to Krasnow or Rothstein. He asked Krasnow if he remembered the price that he offered to sell his asparagus to Krasnow for Rothstein, Krasnow said

(Testimony of George N. Edwards.)

"No, George, I don't remember anything about the deal."

Cross-Examination.

By Mr. TORREGANO:

Mr. TORREGANO: Mr. Edwards, you testified that the total bunch crate asparagus included or reflected in documents No. 8—Plaintiff's Exhibit 8—is 15,161—is that correct?

The WITNESS: Yes, sir.

Mr. TORREGANO: Can you state to the Court and jury what are the different grades contained in the 15,161 crates of asparagus—bunch asparagus?

The WITNESS: I——

Mr. DINKELSPIEL (interrupting): May I ask the Court to have the last question?

The COURT: Read the question, Mr. Reporter.

[145]

(Question read.)

The WITNESS: Yes.

Mr. TORREGANO: How many crates, if any, were Colossal asparagus?

Mr. DINKELSPIEL: I object to that, if the Court please, as being incompetent, irrelevant and immaterial, and not as proper cross-examination.

The COURT: I will sustain the objection.

Mr. TORREGANO: Note an exception. How many crates, if any, were Jumbo asparagus?

Mr. DINKELSPIEL: I make the same objection.

The COURT: Same ruling.

(Testimony of George N. Edwards.)

Mr. TORREGANO: Exception. How many crates, if any, were Extra Select asparagus?

Mr. DINKELSPIEL: Same objection.

The COURT: Same ruling.

Mr. TORREGAN: Exception. How many crates, if any, were Select asparagus?

Mr. DINKELSPIEL: Same objection.

The COURT: Same ruling.

Mr. TORRENGA: Exception. How many craes, if any, were Extra Fancy asparagus?

Mr. DINKELSPIEL: Same objection.

The COURT: Same ruling.

Mr. TORREGANO: Exception. How many crates, if any, were Fancy Asparagus?

Mr. DINKELSPIEL: Same objection.

The COURT: Same ruling.

Mr. TORREGANO: Exception. [146]

The WITNESS: The net proceeds reflected in Exhibit 8 showed the money received by him. There was deducted before he received this money all shipping charges, freight commission, pre-cooling and cartage charges. All charges were deducted from his account sales. Whatever charges originated here followed the shipment east and Roper arranged with agents in the east to make the total deductions there and the agent in the east sent a check to Roper for what charges Roper had against the shipment and the agent kept his own and he got a check for the net proceeds, after all these deductions were charged. The account sales is made up by the one who sells

(Testimony of George N. Edwards.)

the asparagus in the East, and when he sells that asparagus against that particular shipment, the seller has a memorandum of the charges that have accrued against that particular shipment. Part of those have been paid out by Roper, and part of them is commission Roper is to get out of the sale, and part of them is the seller's charges and commission, and the seller makes a deduction on the account sales for the entire amount and sends the check for the net proceeds. The total commission charge was 10% and that was divided between Roper and the eastern agent. He don't know whether he has ever seen any checks or money passed from one to the other. His general understanding was that the man in the east got 5% commission and the forwarder here, 5% commission. All of his dealings had been through a representative on the coast and he had never dealt direct with any eastern representative. He did not try to deal directly with any eastern concern in 1934 with reference to the asparagus in question. The figures shown on Plaintiff's Exhibit No. 8 represented a complete accounting of the money to be received from the sale of the asparagus. He was familiar with the fact that claims were filed against the railroad with reference to asparagus shipped. Claims are filed by the forwarder. He received from Roper an accounting of the money received from the [147] railroad company on the claims filed. He did not know whether he had with him the statement showing moneys collected by Roper from the railroad claims filed.

(Testimony of George N. Edwards.)

Mr. TORREGANO: I am calling your attention to the Defendants' Exhibit 8, and ask you again does Defendants' Exhibit 8 show the entire money received from the sale, disposition or consignment of the asparagus which you had negotiated with Rothstein for sale [148] to them? I said Defendants', your Honor—Plaintiff's Exhibit 8.

The WITNESS: No.

Mr. TORREGANO: It does not?

The WITNESS: No.

Mr. TORREGANO: We move to strike out from the record, if your Honor please, Plaintiff's Exhibit No. 8, on the ground it is incomplete.

The COURT: Motion denied.

Mr. TORREGANO: We note an exception.

The WITNESS: In addition to the money specified, he realized upon the crop shipped east, there may be forty or fifty dollars, he don't know, he can't state positively, there may be a few dollars more, he don't think it amounts to more than forty or fifty. Roper would send him a check for moneys collected from the railroad claims.

Mr. TORREGANO: Please tell this Court and jury as to whether or not, prior to October 1934, had you received from Mr. Roper a check or checks covering recovery made by and pursuant to claims filed with the railroad company by reason of the shipments of the asparagus delivered to him at Isleton?

(Testimony of George N. Edwards.)

The WITNESS: I couldn't tell without consulting my records.

Mr. TORREGANO: Did you refer to your records before this case commenced, for the purpose of ascertaining that?

The WITNESS: I don't recall.

Mr. TORREGANO: Let me get this straight. You have testified that Plaintiff's Exhibit No. 8 reflects entries placed there each day as the transaction occurred; is that correct?

The WITNESS: Yes, sir.

Mr. TORREGANO: Tell the Court and jury why did you not place on this record that you have produced here in evidence, Plaintiff's Exhibit 8—collections made by Mr. Roper upon claims [149] filed with the railroad company?

The WITNESS: They generally come in probably a year afterwards,—the following year,—if there is any—or he doesn't give me any record. In his report filed he shows the total receipts of the asparagus. It don't show railroad claims, but he received a total amount of money for the sale of the asparagus, and that appears in the record.

Redirect Examination.

By Mr. DINKELSPIEL:

The WITNESS: The reason why he did not attempt to ship or consign his asparagus directly to ultimate consignees and agents, such as John

(Testimony of George N. Edwards.)

Nix in New York, was that it is necessary in order to get the advantage of the best carload rates of freight to make up full carloads; and if he was shipping direct to the Eastern buyer he would have to solicit or go in the business of securing shipments from other sources in order to make up full carloads when the amount of asparagus he had for shipment that day would not do to make up the full carload. In order to receive the best prices for asparagus he would have to keep in daily wire communication with all the Eastern markets of the United States to ascertain the conditions there; that is a business within itself, which he did not consider within his province.

Mr. TORREGANO: We object to that on the ground it is self-serving, and is the conclusion and opinion of the witness as to what his province is about the sale of this asparagus. We move to strike out the answer.

The COURT: Same will be denied.

Mr. TORREGANO: Exception.

Recross Examination.

By Mr. TORREGANO:

The WITNESS: The checks from Roper with reference to refunds from railroad claims were turned over by him to his cashier and it [150] was entered in the books accordingly. In this case, the 1934 asparagus account would be credited with the amount and placed in the files of whatever year it

(Testimony of George N. Edwards.)

happens to be in, it goes in those files. He did not know whether it was called a separate record. He has a file for Roper. He was not positive whether he had an account in his books with Roper showing debits and credits of Roper's account with him. He was quite sure there was an account with Roper but it was just a minor matter. The money received from the railroad claims would be credited to the 1934 asparagus sales. The records, Plaintiff's Exhibit 8, did not indicate that there was a carload of asparagus shipped to any shipper on any one day. The name "Roper" after the entry (Plaintiff's Exhibit 8) means the car was originally shipped to Roper and later diverted, in this particular case to John Nix & Co. He is not positive whether or not he accepted Roper's accounting, or whether or not the checks made out by the railroad company came directly to him. The checks are always made payable to him. He was unable to give any definite amount as to how much would be involved in the railroad claims and he could only make a guess.

The COURT: Your best estimate, or is it merely a guess? [151]

The WITNESS: Just what I have received in past years, I do not recall now.

The COURT: What would it amount to?

The WITNESS: $40 or $50—I would not say.

The COURT: Speak out loud.

(Testimony of George N. Edwards.)

The WITNESS: It would probably amount to $40 or $50.00.

The COURT: Let's proceed.

Mr. TORREGANO: What was the last question?

The COURT: Read the question.

(Question read.)

Mr. TORREGANO: I move to strike that out on the ground it is purely speculative, expressing the conclusion and opinion of the witness; and the testimony affirmatively shows he is not in position to express his conclusion upon speculation.

The COURT: Motion to strike will be denied.

Mr. TORREGANO: Note an exception.

Redirect Examination.

By Mr. DINKELSPIEL:

Mr. DINKELSPIEL: From your experience as a shipper of asparagus to the Eastern markets—bunch asparagus—what has been, if you recall, the annual average of payments received from the railroad for claims filed,—if you know, at this time?

Mr. TORREGANO: I object to that as being incompetent, irrelevant and immaterial, and not binding upon these defendants, and not the best evidence.

The COURT: I will allow the question.

Mr. TORREGANO: I note an exception.

The WITNESS: I can't recall the exact amount.

The COURT: He is not asking you for the exact amount. [152]

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: Will you please read the question?

The COURT: Read the question, Mr. Reporter.

(Question read.)

Mr. TORREGANO: We object on the further ground, if your Honor please, there is no foundation laid, and it does not show the volume of business done in that particular year to show what the annual charge would be, and it does not show the volume of business done in the time he wants the witness to average the annual charge. The 1934 year may be an exceptional one.

The COURT: I will allow the question.

Mr. TORREGANO: We note an exception.

Mr. DINKELSPIEL: May I change the question, then, to cover the period since he has been receiver for the Golden State Asparagus Company?

Mr. TORREGANO: We object, as it does not show the quantity of cars shipped nor the quantity involved during the time he was receiver.

The COURT: I will allow the question.

Mr. TORREGANO: Wait a minute. I note an exception.

The WITNESS: To the best of my recollections, the annual recovery from railroad claims would not exceed $100.

The COURT: And the volume or amount of shipments was about the same in 1934 as those other years?

The WITNESS: Prior years were more, your Honor.

(Testimony of George N. Edwards.)

Mr. DINKELSPIEL: At this time, if the Court please, I will again resume my offer as an exhibit in this case, of Plaintiff's Exhibit "E" for identification,—being Government reports produced by Mr. Edwards this morning.

Mr. TORREGANO: I object on the ground it is hearsay, incompetent, irrelevant and immaterial, and not the best evidence.

The COURT: The objection will be overruled, and it will be received as Plaintiff's Exhibit No. 9 in evidence. [153]

Mr. TORREGANO: We note an exception.

Said Plaintiff's Exhibit No. 9 consists of fifty-four [154] (54) mimeographed pages entitled the "Federal-State Market News Service; United States Department of Agriculture, Bureau of Agricultural Economics; California Department of Agriculture Market Information Service, Cooperating", purporting to contain reports by direct leased wire from important markets of sales on the dates shown to jobbers of asparagus shipped from California and other markets. The dates covered by said exhibit are:

1934—February 26, 27, 28.
March 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31.
April 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24, 25, 28, 30.
May 1.

(Testimony of George N. Edwards.)

The markets designated in said exhibit are as follows:

Boston, Chicago, Kansas City, New York, Philadelphia, Pittsburgh, Baltimore, Atlanta, San Francisco, Washington, Los Angeles, Cincinnati, Portland, Oregon, Seattle, St. Louis, Minneapolis, Cleveland, Detroit.

The only prices quoted therein are the prices for which the following asparagus was stated therein to have been sold to the jobber at the markets specified:

Crated bunch asparagus classified as either jumbos, colossal, extra select, select, extra fancy, fancy, U. S. No. 1, either small, medium or large; [155]

Crated loose asparagus classified as either small, medium or large; U. S. No. 1, small, medium or large; U. S. No. 2, small, medium or large;

Loose per pound: Extra select, select, extra fancy and fancy; white, small, medium or large; green, small, medium or large.

(Testimony of George N. Edwards.)

One of the fifty-four (54) pages

(PLAINTIFF'S EXHIBIT No. 9)

which is in exactly the same form as the remaining pages, reads as follows:

"Federal-State Market News Service

United States Department of Agriculture, Bureau of Agricultural Economics. Room 1, Ferry Bldg., San Francisco, Calif.

California Department of Agriculture, Market Information Service, Cooperating. Tel. Exbrook 6317-18.

Monday, Feb. 26, 1934

Asparagus No. 1

Carlot shipments reported for Feb. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

Express Shipments									
Northern California		2	2	2	3	1	4	1	3
Central California	1	2	3	2	2	1	4	4	
Imperial Valley						1			1
Freight Shipments									
Northern California				3	1	2	6	6	3
Central California					5	2		1	5
	1	4	5	7	11	7	14	12	12

Reports by Direct Leased Wire from important markets. This Morning's Sales to Jobbers—Unless Otherwise Stated.

Boston 14° Snowing. 2 Calif. arrived by express. No cars on track. Supplies moderate. Demand limited, market slightly weaker. Calif. Pyramid crates, dozen bunches, green, Extra select $5.50-6.50, Select $5-6; Extra fancy $4-4.50; fancy $3-4.

(Testimony of George N. Edwards.)

Chicago 7° Cloudy. 1 Calif. arrived by express, 1 car on track. Supplies moderate. Demand and trading slow on account of weather, Market unsettled. Very few sales —Calif. Dozen bunches, Northern District. Extra Select $5.50-6, Select $5-5.50, extra fancy $4-4.50, fancy mostly $4.00. Loose, medium to large, mostly $3-3.50, few best high as $4, small $2.50-2.75; Imperial Valley—Extra Select $3.75-4, Select $3.25-3.65; few $3.75-4; Extra fancy $3-3.25, fancy $2.50-2.75. [156]

Kansas City 1° below, Clear. Arrivals unreported. Supplies light. Practically no demand or trading, too few sales to establish market, dealers asking on Calif. dozen bunches, U. S. No. 1, medium to large, $5.50-6, U. S. No. 2 bulk, medium to large, $4.00.

New York 21° Snowing. 4 cars arrived, unloaded—4 Calif. express, no cars on track. Supplies moderate. Demand slow, market weak. Calif. Dozen bunches, Colossal to Jumbos $5-7, few higher, mostly around $6, Extra select $4.50-5; Select $3.50-4.50, mostly $4-4.25; Extra fancy $3.25-4, mostly $3.50-4, fancy $2.75-3.50. Loose, small to medium, $3-3.50, poorer, low as $2.25.

(Testimony of George N. Edwards.)

Philadelphia 19° Snowing. 3 Calif. arrived by express. No cars on track. Supplies liberal. Demand limited on account of weather, market weaker. Calif. Dozen bunches, Extra Select $4.50-5, very few higher, Select $4.50-5.50, short $4; Extra Fancy $4-5; short $4, fancy $2.50-3.75.

Pittsburgh 15° Snowing. No carlot arrivals, no cars on track. Supplies very light. Demand slow, market dull. Calif. Dozen bunches, large $6-6.50, medium $5.50-6, small $5-5.50; loose, small $5.00.

Baltimore 18° Sleeting. No carlot arrivals, no cars on track. California express receipts moderate. Supplies light. Demand limited, market unsettled. Calif. Doz. bunches: Green, large $5.50-6; medium $4-4.50; small $2.50-3.50.

Atlanta 30° Clear. Practically no supplies on market. Too few sales reported to quote. San Francisco 55° Partly Cloudy. 1899 crates green, 877 crates white arrived by truck. Supplies liberal. Demand moderate, market steady. Street Sales: per lb.—Sacramento—Delta, loose, white, large 9-10¢, medium 7-8¢, small 6-7¢, Green, large 10-11¢, few 12¢, medium 8-9¢, small 7-8¢.

Washington 19° Snowing. Express receipts very light, Supplies very light. Demand and trading limited, Market steady. Very few sales—Calif. Dozen bunches—Green $4-7 according to grade.

(Testimony of George N. Edwards.)

Los Angeles 54° Cloudy. No carlot arrivals; no cars on track. Truck receipts equiv. 1 car. L. C. L. express receipts equiv. 3 cars. Supplies liberal, demand slow, market weaker. Imp. Valley: Bunched, Crates, Select $2.50-2.75; few $2.25; extra fancy $2-2.25 mostly $2.25; Fancy mostly $2.00, unclassified, few $2.00. Delta: Loose, per lb., Select 12-13¢, some low as 11¢; Extra [157] Fancy 9-10¢, Fancy 8-9¢; Choice mostly 7¢; Some high as 8¢ and low as 6¢; Coachella Valley: Bunched, crates, Extra Fancy $2.50-2.75, Fancy $1.85-2. Local: Loose, per lb., Extra Fancy large 16-18¢, fancy 14-15¢.

W. F. COX
Local Representaive."

Released 12:15 P. M." [158]

Whereupon, plaintiff rested.

Mr. TORREGANO: At this time, we make the following motions on behalf of the defendants:

We move, if your Honor please, for an order to strike out from the record of the proceedings the following evidence or testimony: Testimony given by the plaintiff, George N. Edwards, and the witness Martin J. Dinkelspiel upon the ground that said testimony relates to a negotiation pertaining to a contract required by the statute of frauds to be

put in writing, and that the evidence in the case shows affirmatively that no contract was reduced to writing; that such evidence was and is irrelevant, incompetent and immaterial to the issues as presented by plaintiff's complaint on file.

That there is a variance between the pleadings and the proof in that the pleadings affirmatively allege that the defendants executed a contract in writing, whereas the testimony introduced by plaintiff shows affirmatively no contract in writing and signed by the parties as required under and pursuant to the provisions of the statute of fraud.

That all evidence introduced by plaintiff purporting to show the damages alleged to have been sustained by plaintiff as set forth in his said complaint upon the ground that said evidence so introduced by plaintiff is incompetent to prove damages, and that the evidence so introduced is irrelevant and immaterial to the issues of damages as presented by said plaintiff in his verified complaint; that said evidence is not the best evidence, is hearsay as against the defendants.

Does your Honor desire to rule upon the motion?

The COURT: Yes. Do you resist the motion, Mr. Dinkelspiel?

Mr. DINKELSPIEL: Yes, your Honor. [159]

The COURT: Same will be denied.

Mr. TORREGANO: We now, at this time, if your Honor please, move the Court for an order directing the jurirs to return a verdict in favor of the defendants and each of them, upon the following grounds:

First: that the evidence is insufficient to sustain a verdict or judgment in favor of plaintiff in that

it affirmatively shows that no contract in writing, as alleged in said complaint, was entered into by and between plaintiff and defendants for the sale by the plaintiff and the purchase by the defendants of bunch asparagus at $2 per crate f.o.b. Isleton, California;

Second: that it affirmatively appears from the evidence that the sole transactions had between plaintiff and defendant were negotiations looking towards the entering into of a contract for a sale by said plaintiff and the purchase by defendants of bunch asparagus.

Third: that it affirmatively appears from the evidence that the negotiations relative to the entering into of said contract between said plaintiff and defendants was for the purpose of having said plaintiff and defendant arrive as to the manner of payment of said asparagus when contracted for by said defendants. That said defendants and said plaintiff failed to negotiate a satisfactory arrangement to both of them as to the manner of payment for said asparagus.

Fourth: that it affirmatively appears from the evidence that plaintiff and defendants intended, prior to entering into any contract for the sale of asparagus by plaintiff to defendants, to reduce in writing said contract and obtain the approval of the Court thereon, and that said contract would not be binding upon either of the parties until such approval was obtained; there- [160] fore said purported contract lacks mutuality between the parties as required by law.

Fifth: that the evidence affirmatively shows that the plaintiff has failed to prove the damages alleged by him to have been suffered by reason of any alleged breach of contract upon the part of said defendants in that said evidence so introduced by plaintiff was and is irrelevant, incompetent and immaterial to prove damages; hearsay, and not the best evidence.

Sixth: that it affirmatively appears from the evidence introduced by plaintiff that plaintiff and defendants, after being unsuccessful in their negotiations toward entering into a contract for the sale of asparagus by plaintiff to defendants, said plaintiff and defendants mutually abandoned said negotiations and did not enter into a contract.

Seventh: that it affirmatively appears from the testimony introduced by plaintiff without contradiction that the telegrams introduced in evidence—Plaintiff's Exhibits Nos. 2 and 3—did not contain all the essential elements of the contract intended to be entered into between plaintiff and defendants in that said Plaintiff's Exhibits Nos. 2 and 3,—said telegrams,—did not contain a mutual agreement between the plaintiff and defendants as to the kind of asparagus to be sold by plaintiff and defendants, and a mutual agreement between the plaintiff and defendants as to the method of payment for said asparagus, when and if sold to defendants by plaintiff; and that the evidence further shows that the plaintiff did not intend to be bound by said telegrams until he obtained a court approval of the contract he was entering into; and that the evidence

further shows that the defendants did not intend to be bound by any negotiations towards the entering into of a contract until the contract had been reduced to writing and [161] signed by the parties.

I am prepared, if your Honor please, to abide by your Honor's directions in regard to the presentation.

Mr. DINKELSPIEL: We resist the motion.

The COURT: The motion for a directed verdict will be denied.

Mr. TORREGANO: May I have an exception to the order denying the motion to strike the evidence; and also an exception to the order denying the motion for a directed verdict?

The COURT: The record will show counsel's statement.

Mr. TORREGANO: And the record will show I am taking an exception to your Honor's ruling?

The COURT: The record shows exactly what counsel has said, I presume.

Mr. TORREGANO: Defendants rest. [162]

Whereupon the court gave to the jury the following instructions:

INSTRUCTIONS.

The COURT: You are here, Gentlemen of the Jury, for the purpose of trying solely the issues of fact presented in this case. It is my duty to state to you the law applicable to the case, and it is your duty to pass upon all questions of fact. You will distinctly understand that in this charge the Court

is in no manner or form expressing or desiring to express any opinion on the weight of the evidence, or any part of it, or the truth or falsity of any witness' testimony, or that any alleged fact is or is not proved.

Your power of judging of the effect and value of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

The Court cautions you to distinguish carefully between facts testified to by witnesses and statements made by the attorneys in their arguments of presentation as to what facts have been proved, and if there is a variance between the two you must, in arriving at your verdict, to the extent that there is such variance, consider only the facts testified to by the witnesses, and you are to remember that the statements of counsel in their arguments are not evidence in the case.

It sometimes happens during the trial of a case that objections are made to questions asked, or to offers made to prove certain facts, which objections are sustained by the Court; and it sometimes happens that evidence given by a witness is stricken out by the Court on motion. In any of such cases you are instructed that in arriving at a verdict you are not to consider as evidence anything that has been stricken out by the Court, or anything offered to be proven or contained in any question to [163] which an objection has been sustained by the Court.

If counsel have stipulated or agreed to certain

facts you will regard the facts so stipulated to as being conclusively proved.

In determining the credibility of a witness you should consider whether his testimony is in itself contradictory, whether it has been contradicted by other credible witnesses, whether the statements are reasonable or unreasonable, whether they are consistent with other statements or with the facts established by evidence, or admitted facts. You may also consider the manner of the witness, the character of his testimony, the bias or prejudice, if any, manifested by him, his interest in or absence of interest in the suit, his recollections, whether good or bad, clear or indistinct, concerning the facts to which he testifies, his inclination or motive, together with the opportunity for knowing the facts whereof he speaks.

You are instructed that in arriving at a verdict you must not permit yourselves to be influenced in the slightest degree by sympathy, prejudice or any emotion in favor of or against either party or arrive at a verdict on mere suspicion or mere conjecture, but you must proceed solely upon the evidence introduced and the instructions of the court.

You are instructed that a witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, by the character of his or her testimony, or by his or her motives, or by contradictory evidence. If any witness examined before you has wilfully sworn falsely as to any material matter, you may disbelieve his or her entire testimony.

If the evidence is contradictory your decision must be [164] in accordance with the preponderance thereof. It is your duty, however, if possible to reconcile such contradictions so as to make the evidence reveal the truth.

When the evidence, in your judgment, is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the party on whom rests the burden of proof.

In civic cases the affirmative of the issue must be proved. The affirmative of the issue is upon the plaintiff as to all affirmative allegations in the complaint. Upon the plaintiff, therefore, rests the burden of proof of such allegations.

You are the exclusive judges of the weight and sufficiency of the evidence. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds against a less number.

The direct evidence of one witness is sufficient for proof of any fact in a civil case.

You are instructed the jury is not bound to believe anything to be a fact simply because a witness has stated it to be so, provided you feel from all the testimony the witness is mistaken or has testified falsely.

In civil cases a preponderance of the evidence is all that is required, and by this is meant such evidence as when weighed with that opposed to it has more convincing power and from which results the

greater probabilities in favor of the party upon whom the burden of proof rests.

In civil cases the affirmative of the issue must be proven. The affirmative here is upon the plaintiff as to all affirmative allegations of the complaint; the burden of proof is upon defendants as to all affirmative defenses set up in defendants' [165] answer. Therefore, upon plaintiff rests the burden of proof as to the allegations in the complaint and on the defendants as to the affirmative defenses contained in the answer.

You are instructed that it is admitted by the pleadings, the second answer of defendants, that on February 13, 1934, plaintiff offered to sell defendants all asparagus shipped by plaintiff f.o.b. Isleton, California, at two dollars per crate up to and including April 10, 1934, provided a satisfactory bank guarantee was given immediately to insure payment of all drafts as against all shipments to defendant. If you find from the evidence that defendants accepted this offer but failed to execute, or refused to furnish said guaranty, your verdict shall be for plaintiff.

You are instructed that in legal contemplation a contract is an agreement between two or more persons upon sufficient consideration to do or not to do a particular thing. In other words, to make a contract there must be an offer by one party for a sufficient consideration, to do or not to do a particular thing, and there must be an acceptance by the other party of that offer, and this offer and accept-

ance must be equally binding upon both parties to the agreement and must be to do or not to do a particular thing.

You are instructed that a valid and binding contract may be made by the exchange of letters or telegrams. To constitute a binding contract made in the form of letters or telegrams the proposal or offer by the one party must be accepted by the other party upon the terms offered and without qualification. In order to constitute a binding contract the acceptance must be absolute and unqualified.

Where parties through written correspondence reach a specific and definite agreement, intending that the agreement [166] shall be subsequently expressed formally in a single paper, which shall be the evidence of what has been agreed upon, the obligatory character of the agreement cannot ordinarily be defeated by the failure of either party to sign the formal contract.

You are instructed that where one party agrees to perform a contract or any condition in a contract to the satisfaction of the other, the latter is the sole judge as to whether the contract is performed to his satisfaction, provided such satisfaction is that which a reasonable person would exact, and provided he acts in good faith, and that his dissatisfaction is actual and not pretended.

You are instructed that the plaintiff in support of the allegations of his complaint has introduced in evidence two telegrams, one addressed from the

plaintiff to the defendants and the other from the defendants to the plaintiff. For the purpose of explaining the terms used by the parties, evidence has been introduced. The Court instructs you that if you find from the evidence that the plaintiff offered to sell all of the asparagus grown by the Golden State Asparagus Company during the period specified in the telegram sent by the plaintiff, and the defendant by its telegram offered to purchase all bunch asparagus grown by the Golden State Asparagus Company during the time specified in the telegrams, then you are to determine from the evidence if the plaintiff and defendants understood the same thing as to what was being offered for sale and what was agreed to be purchased.

If you find from the evidence that the meaning placed upon the term "satisfactory bank guarantee" by plaintiff is different than that placed by the defendants, and if you find that the minds of the plaintiff and defendants did not meet as to the [167] meaning of the words "satisfactory bank guarantee" used in plaintiff's telegram, then the Court instructs you that no contract was entered into between plaintiff and defendants, and your verdict, therefore, must be for the defendants.

You are instructed if a phrase has no ascertainable meaning and was in fact differently understood by the parties, then there is no meeting of minds.

You are instructed that any uncertainty existing in an agreement is to be interpreted most strongly

against the one who prepares the instrument and causes the uncertainty.

Confirmation implies a deliberate act intended to renew or ratify a transaction that would be otherwise unenforceable.

If you therefore find from the evidence that plaintiff in sending his wire under date of February 12, 1934, to the defendant confirmed a verbal understanding or agreement, and that the defendant with full knowledge of that prior understanding sent his telegram under date of February 13, 1934, in acknowledgment of plaintiff's telegram, and also confirming said transactions, you will find in favor of the plaintiff.

It is admitted by defendants that defendant M. H. Rothstein is a co-partner of the partnership doing business under the firm name and style of H. Rothstein & Son, defendants herein.

You are instructed that every partner is an agent of the partnership for the purpose of its business, and the acts of every partner, and instruments executed by him for apparently the purpose of carrying on the usual way of business of the partnership is binding on the partnership.

Where a person voluntarily puts it out of his power to do what he agreed to do he breaks his contract; that is called an anticipatory breach of contract, and such person is immediately [168] liable to be sued for such breach without demand, even though the time specified for the performance of the contract has not expired.

You are instructed that the rule that an agreement in writing supercedes all prior or contemporaneous oral negotiations, and that such prior negotiations can not be introduced to contradict, add to or vary the terms of a written instrument, has an exception where the contract is uncertain or ambiguous upon its fact, resort may be had to prior oral negotiations to ascertain the intention of the parties to aid in the construction and interpretation of the contract.

For the purpose of determining what the parties to this litigation intended by the language used, it is competent to show, not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties d*uc*ing the negotiations at and before the time of the execution of the contract may be shown.

If, therefore, you find from the evidence surrounding the transmission of said telegrams, that the parties understood the term "bunch asparagus" to be "all asparagus shipped" f.o.b. cars Isleton, to be the same kind of asparagus, the parties will be held to have so intended, and such intention as indicated may be gathered from the surrounding circumstances.

It is a general rule that when there is a known usage in the trade persons carrying on that trade are deemed to have contracted in reference to the

usage unless the contrary appears; that the usage forms a part of the contract, and that evidence of usage is always admissible to supply a deficiency or as a means [169] of interpretation where it does not alter or vary the terms of the contract.

In order to be of any binding force, custom and usage must be reasonable and must be general as to place and not confined to any particular concern or business house.

A person is not bound by custom or usage unless he has actual knowledge thereof or that it is so general or well known in the community as to give rise to the presumption of such knowledge. The general usages of a particular trade or business are presumed to be known to those engaged in it and if known the parties are held to have contracted with reference to them unless the contrary appears.

A custom inconsistent with the terms of a written contract is not a proper subject matter of defense. Where a contract contains an express provision and a custom or usage exists inconsistent therewith, the custom and usage must give way to the express provision of the contract. A custom or usage is applied only when the contract is silent on the subject.

A compromise is an agreement between two or more persons who, to avoid a law-suit, amicably settle their differences on such terms as they can agree upon; it is an adjustment of matters in dispute by mutual consent without resort to law.

An attempt, however, or mere effort to compromise, does not constitute a compromise. It is not

an admission of an existing liability, or that a contract does not in fact exist, and can not be considered by the jury at all in arriving at a verdict.

You are instructed that if you find that plaintiff is entitled to recover damages from defendants, you must determine the amount of damages from the evidence admitted by the Court and not by mere conjecture. [170]

You are instructed that the burden of proving the extent of damages is on the person claiming the damages.

You are instructed that the measure of plaintiff's damage, in the event you find that defendants breached the contract with plaintiff, is the difference between what defendants contracted to pay for the asparagus and the market value thereof at the time when the asparagus ought to have been accepted.

You are instructed that the price at which the asparagus was sold does not determine the market value of the asparagus at the time of the sale thereof, but is admissible as evidence in the determining of such market value.

You are instructed that if you find from the evidence that the terms "all asparagus" and "all bunch asparagus" have a different meaning to the parties to the negotiations and was not mutually understood by them, then you are instructed that as the telegram from plaintiff offered to sell "all asparagus shipped", and the telegram of defend-

ants offered to buy "all bunch asparagus" that there was no acceptance of the offer as made by plaintiff, and, therefore, th*ey* unless you find from the evidence that plaintiff accepted a counter-offer of defendants to purchase "all bunch asparagus" and communicated to defendants his acceptance of defendants' offer, then your verdict must be for the defendants.

A guaranty is a promise to answer for the debt, default, or miscarriage of another person.

You are instructed that in order for the plaintiff to be entitled to recover any damages from the defendants you must first find that plaintiff and defendants entered into the contract set forth in plaintiff's complaint; that the contract was no abandoned, and that the defendants breached the contract and that as a result of the breach the plaintiff suffered a damage. [171]

The Court instructs you as a matter of law that if you should find from the evidence that plaintiff and defendants entered into a contract and thereafter plaintiff, by his actions and words, led defendants, as reasonable and prudent persons, to believe that plaintiff intended to abandon further dealings with defendants with reference to the sale of the asparagus mentioned in plaintiff's complaint and if you find from the evidence that defendants, by their words and actions expressed themselves as consenting to the abandonment, then you must find that the plaintiff and defendants consented

that the contract be rescinded and your verdict must be for defendants.

Mr. TORREGANO: Does that complete your charge?

The COURT: I have not completed my charge. Gentlemen, upon retiring to the jury room it will be your duty first to select a foreman and then proceed to your deliberations. In the Federal Court, both a *vicil* case and in a criminal case, it is necessary that any verdict be one that is not only the verdict of the jury as a whole, but of each and every juror; in other words, a Federal verdict must be unanimous. One juror can prevent a jury from having an unanimous verdict. I am submitting to you two forms of verdict—"We, the jury find, in favor of the plaintiff and assess the damages against the defendants in the following sum." If you should reach that verdict you will insert the amount and it will be signed by your foreman. The form of the other verdict is: "We, the jury, find in favor of the defendants." If you find that verdict it should be signed by your foreman. Any judgment in this case would have to be limited to the prayer, which is, as it has been stipulated by counsel for the plaintiff, not in excess of $7,604.02 as requested. Now, Mr. Torregano.

[172]

Mr. TORREGANO: If your Honor please, may I at this time enter a formal exception to your Honor giving plaintiff's instructions Numbers 4, 8, 14, 23 and 24, and also to your Honor's refusal

to give the instructions as proposed by the defendants, Numbers 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 39—refusal to give them as proposed or give them as modified.

The COURT: Have you any objections?

Mr. DINKELSPIEL: No, your Honor.

The COURT: I might say the failure of the Court to give those instructions is either due to the fact I feel they are covered by the instructions given, or they are erroneous, and I also call counsel's attention to the fact that all instructions referred to by counsel before, by counsel for the defense, were offered in violation of Rule 40, and I also deem that a reason or excuse for not giving them. I presume there is no objection if the jury call for any exhibits for the jury to receive them—that are now in evidence.

Mr. TORREGANO: No.

Mr. DINKELSPIEL: No." [173]

Whereupon, the jury retired to consider of their verdict, and subsequently returned into court their verdict in favor of the plaintiff and against the defendants Henry Rothstein, M. H. Rothstein, and I. Rothstein, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, and H. Rothstein & Son, a copartnership, which said verdict is in words and figures as follows:

"[Title & Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff

and asses(s) the damages against the Defend-
five EHC
ants in the sum of Seven thousand six hundred
EHC two EHC
seventy four dollars and fifteen cents.
Dollars $7674-15/100
$7504-02/100

EDWARD H. CLARK, JR.,
Foreman."

Thereupon, on the 1st day of November, 1935, judgment upon the verdict of the jury was entered in favor of plaintiff, George N. Edwards, as receiver in equity of Golden State Asparagus Company, a corporation, and against the defendants Henry Rothstein, M. H. Rothstein, I. Rothstein, John Doe and Richard Roe, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, and H. Rothstein & Son, a copartnership, together with costs expended, taxed at Fifty-eight and 35/100 Dollars ($58.35).

Thereafter, on the 8th day of November, 1935, a motion for a new trial was filed herein, reading as follows:

"[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Now come HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, a copartnership, [174] defendants in the above entitled action, and move the above entitled court for an order setting aside the ver-

dict and judgment herein, and granting a new trial of the above entitled cause for the following reasons, to-wit:

A. That the evidence is insufficient to support the verdict upon the following grounds:

1. That plaintiff's cause of action is based upon the alleged breach of a contract in writing, whereas the evidence affirmatively discloses that no contract in writing was entered into by and between plaintiff and defendants as alleged in plaintiff's complaint.

2. That the writings introduced in evidence by plaintiff upon which plaintiff based his cause of action affirmatively disclose that the plaintiff and defendants were not to be bound thereby until a written contract was prepared and signed by said parties. The evidence affirmatively discloses that a written contract was prepared by plaintiff but was not signed by either plaintiff or defendants.

3. That it affirmatively appears from the evidence that plaintiff and defendants abandoned all negotiations with reference to the contract upon which plaintiff's cause of action is based.

4. That it affirmatively appears from the evidence that the records of the plaintiff introduced in evidence (Plaintiff's Exhibit No. 8) in order to prove the alleged damages suffered by plaintiff as a result

of the alleged breach of contract by the defendants did not constitute a true and correct report and account of all monies received by said plaintiff from the sale of the asparagus, the subject matter of plaintiff's cause of action, in that said records did not include monies received from railroad companies upon claims filed with reference to said asparagus. [175]

5. That it affirmatively appears from the evidence that the said records introduced by plaintiff in order to prove the alleged damages were not the original and regular books of account kept by plaintiff of the monies received from the sale of the asparagus, the subject matter of plaintiff's cause of action.

6. That it affirmatively appears from the evidence that the records introduced in evidence (Plaintiff's Exhibit No. 8) in order to prove the said alleged damages suffered by plaintiff were prepared from figures and data not within the knowledge of plainitff, but were furnished to plaintiff by a third person, not in the employ of plaintiff.

7. That it does not appear from the evidence that the price for which said asparagus was sold was the prevailing market price at the time of sale.

8. That it affirmatively appears from the evidence that neither plaintiff nor the

defendants were to be bound by any writings or dealings had by and between them until such time as the approval of the court was obtained thereto. That it affirmatively appears that no contract was ever tendered to the court for approval.

B. The evidence shows that a verdict should have been rendered in favor of the defendants and that the verdict as rendered is contrary to law for the following reasons:

1. That the plaintiff's cause of action is based upon the breach of a written contract involving more than Five Hundred ($500.00) Dollars. That the evidence shows that no contract in writing signed by the parties to be charged therewith was ever entered into.

2. That the writings introduced in evidence by plain- [176] tiff upon which plaintiff's cause of action is based affirmatively show that the plaintiff and defendants were not to be bound thereby until a written contract was prepared and signed by said parties. The evidence affirmatively discloses that a written contract was prepared by plaintiff, but was not signed by either plaintiff or defendants.

3. That it affirmatively appears from the evidence that plaintiff and defendants abandoned all negotiations with reference to the contract upon which plaintiff's cause of action is based.

4. That it affirmatively appears from the evidence that the records of the plaintiff introduced in evidence in order to prove the alleged damages suffered by plaintiff as a result of the alleged breach of contract by the defendants did not constitute a true and correct report and account of all monies received by said plaintiff from the sale of the asparagus, the subject matter of plaintiff's cause of action, in that plaintiff had not received an accounting from the railroad companies upon claims filed with reference to said asparagus.

5. That it affirmatively appears from the evidence that the records introduced by plaintiff in order to prove the alleged damages were not the final and regular book of account kept by plaintiff of the monies received from the sale of the asparagus, the subject matter of plaintiff's cause of action.

6. That it affirmatively appears from the evidence that the records introduced (Plaintiff's Exhibit No. 8) in order to prove the said alleged damages suffered by plaintiff were prepared from figures and data not within the knowledge of plaintiff, but were furnished to plaintiff by a third person, not in the employ of plaintiff.

7. That it does not appear from the evidence that the [177] price for which

said asparagus was sold was the prevailing market price at the time of sale.

8. That it affirmatively appears from the evidence that neither plaintiff nor the defendants were to be bound by any writings or dealings had by and between them until such time as the approval of the court was obtained thereto. That it affirmatively appears that no contract was ever tendered to the court for approval.

C. Errors in Law occurring at the trial:

1. That the court erred in not granting defendant's motion for a directed verdict in that the writings upon which plaintiff predicated his cause of action did not constitute a contract by and between plaintiff and defendants.

2. That the court erred in permitting parol evidence to be introduced to show the preliminary negotiations had by and between plaintiff and defendants with reference to the essential terms of the alleged contract upon which plaintiff's cause of action was based.

3. That the court erred in permitting the introduction of parol evidence to show the intent of the parties with reference to the essential terms of the alleged contract upon which plaintiff's cause of action was based.

4. That the court erred in admitting in evidence the "Federal Market News"

(Plaintiff's Exhibit No. 9), as the contents of said exhibit were incompetent to show market value at the time of the sale of the said asparagus.

5. That the court erred in admitting in evidence the records of plaintiff (plaintiff's Exhibit No. 8) in order to prove the alleged damages suffered by plaintiff as the result of the alleged breach of contract by defendants in that said records [178] did not constitute the original and regular book of account kept by plaintiff of the monies received from the sale of the asparagus, the subject matter of plaintiff's cause of action.

6. That the court erred in admitting in evidence the records of plaintiff (Plaintiff's Exhibit No. 8) in that it affirmatively appears from the evidence that said records did not contain a complete account of all monies received by plaintiff from the sale of said asparagus as said records did not include monies received by plaintiff from claims filed with said railroad companies with reference to said asparagus.

7. That the court erred in admitting in evidence the records of plaintiff (Plaintiff's Exhibit No. 8) in order to prove the alleged damages suffered by plaintiff in that it affirmatively appears from the evidence that said records were prepared by plaintiff from figures and data not within

the knowledge of plaintiff but were furnished to plaintiff by a third person, not in the employ of plaintiff.

8. That the court erred in admitting in evidence the telegram sent by defendants to plaintiff (Plaintiff's Exhibit No. 3) for the reason that said telegram did not constitute an acceptance of the offer contained in plaintiff's telegram (Plaintiff's Exhibit No. 2).

9. That the court erred in refusing to admit in evidence the telegram received by defendant M. H. Rothstein (Defendants' Exhibit B for Identification) in reply to the telegram dictated by Martin Dinkelspiel, Esq., one of the attorneys for plaintiff, and sent to the defendants at their Philadelphia office, in that said telegram disclosed that defendants were willing to comply with the request of plaintiff with reference to furnishing a satisfactory bank guarantee. [179]

10. That the court erred in refusing to admit in evidence the letter dictated by said Martin J. Dinkelspiel, Esq., and forwarded to the defendants at their office in Philadelphia (Defendants' Exhibit C for Identification) in that said letter conclusively showed that plaintiff at all times was negotiating with defendants for the sale of all of his asparagus and not all of his bunch asparagus as alleged in his complaint.

11. That the court erred in refusing to admit in evidence the letter written by said Martin J. Dinkelspiel, Esq., to the Philadelphia attorneys for defendants (Defendants' Exhibit E. for Identification), in that said letter further showed that plaintiff had negotiated with defendants for the sale of all asparagus and not all bunch asparagus as alleged in his complaint.

12. That the court erred in not admitting in evidence copies of the drafts used by defendants in the transaction of their business (Defendants' Exhibit A. for Identification), as said drafts evidenced the usual practice of the defendants in the arranging of a satisfactory bank guarantee.

13. That the court erred in giving plaintiff's instruction No. 4 for the reason that said instruction dealt with the question of compromise which was not an issue in the proceedings and said instruction permitted the jury to disregard the proposed written contract. (Plaintiff's Exhibit No. 7).

14. That the court erred in giving plaintiff's instruction No. 8 in that said instruction instructed the jury to find in favor of the plaintiff and against defendants if they found that the defendants orally accepted the offer of plaintiffs and refused to furnish the bank guarantee.

15. That the court erred in giving plaintiff's instruction No. 14 in that said in-

struction instructed the jury to find [180] that it was within the sole province of the plaintiff to determine what was a satisfactory bank guarantee.

16. That the court erred in giving plaintiff's instruction No. 23 in that said instruction instructed the jury to find that if the defendants in sending their telegram (Plaintiff's Exhibit No. 3) confirmed a verbal understanding, then the jury could find in favor of the plaintiff. This instruction is contrary to law in that the intent and understanding of the parties as to all the material elements must be shown by the writings.

17. That the court erred in giving plaintiff's instruction No. 24 in that said instruction instructed the jury to ascertain the intent of the parties from oral evidence. Plaintiff's cause of action being within the statute of frauds, it was necessary for the jury to ascertain the intention of the parties as to the essential terms of the alleged contract from the writings alleged to constitute a written contract.

18. That the court erred in refusing to give defendants instruction No. 12 in that the court should have construed the writings and advised the jury the meaning thereof.

19. That the court erred in refusing to

give defendants' instruction No. 13 in that the court should have instructed the jury that if they found from the evidence that plaintiff and defendants had not agreed upon the meaning of the words used by them in their telegram (Plaintiff's Exhibits No. 2 and 3), then no contract was entered into between plaintiff and defendants.

20. That the court erred in refusing to give defendants' instruction No. 14 in that the jury should have been instructed that an acceptance of an offer must in every respect correspond with the offer.

21. That the court erred in refusing to give defend- [181] ants' instruction No. 15 in that the jury should have been instructed that if they found from the evidence that the term satisfactory bank guarantee was too uncertain to be ascertained, then no contract was entered into.

22. That the court erred in refusing to give defendants' instruction No. 18 in that the jury should have been instructed that defendants' telegram (Plaintiff's Exhibit No. 3) constituted a counter-offer to the plaintiff, and that unless the jury found that said counter offer was accepted by plaintiff and communicated to defendants, then no contract was entered into.

23. That the court erred in refusing to give defendants' instruction No. 21 in that

the court should have instructed the jury that if they found from the evidence that there was a misunderstanding as to the manner in which payment for the asparagus was to be guaranteed, then no contract was entered into.

24. That the court erred in refusing to give defendants' instruction No. 22 in that the court should have instructed the jury that unless they found from the evidence that the term "satisfactory bank guarantee" had a meaning agreed upon by plaintiff and defendants, then said term must be interpreted according to the custom and usage of the produce trade.

25. That the court erred in refusing to give defendants' instruction No. 23 in that the court should have instructed the jury that if they found from the evidence that the defendants offered to post a satisfactory bank guarantee according to trade custom and usage, then there was no breach of contract by defendants.

26. That the court erred in refusing to give defendants' instruction No. 24 in that the court should have instructed the jury that if they found from the evidence that the plaintiff [182] did not communicate to the defendants an acceptance of defendants' counter-offer (Plaintiff's Exhibit No. 3), then no contract was entered into.

27. That the court erred in refusing to give defendants' instruction No. 25 in that the court should have instructed the jury that if they found from the evidence that plaintiff and defendants did not agree as to the meaning of guaranteeing payment of the asparagus, the subject matter of plaintiff's action, then no contract was entered into between plaintiff and defendants.

28. That the court erred in refusing to give defendants' instruction No. 26 in that the court should have instructed the jury that if they found from the evidence that according to usage and custom of the produce trade it was necessary for the parties to a contract before same was consummated to agree as to the specifications of the asparagus sought to be sold and that plaintiff and defendants had not so agreed, then no contract was entered into.

29. That the court erred in refusing to give defendants' instruction No. 28 in that the court should have instructed the jury that if they found from the evidence that the essential parts of the intended agreement between plaintiff and defendants were to be determined by future negotiations and that the minds of the parties did not meet as to said essential parts, then no contract was entered into.

30. That the court erred in refusing to give defendants' instruction No. 29 in that

the court should have instructed the jury that if they found from the evidence that the written contract tendered by plaintiff to defendants embodied terms additional to those agreed upon by plaintiff and defendants, then no contract was entered into.

31. That the court erred in refusing to give defend- [183] ants' instruction No. 30 in that the court should have instructed the jury that if they found from the evidence that plaintiff and defendants intended that their agreement would be reduced to a written contract, and that the parties failed to agree upon the terms of said written contract, no contract was entered into.

32. That the court erred in refusing to give defendants' supplemental instruction No. 1 in that the court should have instructed the jury that if they found from the written contract tendered by plaintiff to defendants embodied terms additional to those agreed upon by plaintiff and defendants, then no contract was entered into.

33. That the court erred in refusing to give defendants' supplemental instruction No. 2 in that the court should have instructed the jury that if they found that in accordance with usage and custom of produce dealers it was necessary for a contract for the sale and purchase of asparagus to include the specifications of the asparagus, and that no contract was signed by plaintiff

and defendants wherein the specifications were set forth, no contract was made between plaintiff and defendants.

34. That the court erred in refusing to give defendants' supplemental instruction No. 3 in that the court should have instructed the jury that if they found from the evidence that there was to be no contract biding upon either plaintiff or defendants until the contract was approved by the above entitled court, and that the court's approval had never been obtained, then no contract was entered into between plaintiff and defendants.

D. That Martin J. Dinkelspiel, Esq., one of the attorneys for the plaintiff, was guilty of misconduct in that when demand was made upon him during the course of the trial for the production of the written contract prepared by him (Plaintiff's Exhibit No. 7), [184] counsel stated that he had none; that thereafter while a witness in the above proceedings said Martin J. Dinkelspiel produced and introduced in evidence the written contract prepared by him, the production of which defendants had theretofore demanded.

E. That defendants were taken by surprise in the trial of the above action in that prior to said trial defendants made demand upon plaintiff for the inspection of the writings upon which plaintiff's cause of action was based, and received from the attorney for plaintiff copies

of the two telegrams introduced in evidence. (Plaintiff's Exhibits 2 and 3). That no copy of the contract prepared by counsel for plaintiff (Plaintiff's Exhibit No. 7) was tendered to defendants.

F. That the jury was guilty of misconduct in that it affirmatively appears from the record that the jurors arrived at the amount of damages to be allowed to plaintiff by chance and conjecture.

This motion is based upon all the pleadings, papers and exhibits on file herein, the points and authorities in support thereof, reporters transcript, and upon the verdict of the jury.

Dated this 8th day of November, 1935.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants. [185]

Thereafter, on the 5th day of December, 1935, an order was made and entered by the above entitled court denying defendants' motion for a new trial.

Thereafter, pursuant to stipulation of counsel for plaintiff and defendants, the above entitled court made and entered the following order:

"It appearing to the Court that a stipulation has been filed herein by and between the attorneys for the plaintiff and the attorneys for defendants Henry Rothstein, M. H. Rothstein, I. Rothstein, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, a copartnership, extending the time within which the defendants may

present a proposed form of Bill of Exceptions, and

It further appearing to the Court that the term is about to expire and that the additional time is necessary,

It is hereby ordered and adjudged that the defendants have to and including the 13th day of February, 1936, within which to present a proposed Bill of Exceptions and that the plaintiff may have ten (10) days after the service of said proposed Bill of Exceptions, or such further time as may be allowed by stipulation or order of Court, within while to file objections thereto, and that the same shall thereafter be settled,

It is further ordered and adjudged that the term of court be and the same is hereby extended for a period of three (3) months from the date of this order for the completion of all necessary matters to perfect the record in this cause and for the consideration and settlement of all matters relating thereto, including the settlement of the bill of exceptions and other matters for the perfection of an appeal in said cause, and the court does hereby retain jurisdiction of said cause and of all matters connected therewith for the purpose of completing the record in said cause.

December 13th, 1935.

HAROLD LOUDERBACK
Judge of the United States
District Court."

Thereafter, and within the time allowed by law and as granted by the court, defendants presented their proposed Bill of Exceptions.

Thereafter, on the 24th day of February, 1936, the above [186] entitled court made and entered its order extending the time within which to file the record and docket the cause in the above entitled action in the United States Circuit Court of Appeal for the Ninth Circuit to and including the 29th day of March, 1936, and said court made its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

Thereafter, on the 20th day of May, 1936, the above entitled court made and entered its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

Thereafter, on the 22d day of July, 1936, the above entitled court made and entered its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

Thereafter, on the 23d day of September, 1936, the above entitled court made and entered its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

Thereafter, on the 24th day of November, 1936, the above entitled court made and entered its further order extending the term of court for a period of three (3) months from the date of said order for the purposes hereinabove set forth in the order of December 13th, 1935.

That within the time allowed by law and the orders of the above entitled court, and after notice given as required by law, said proposed Bill of Exceptions and the proposed amendments, additions and corrections thereto were presented to the above en- [187] titled court for settlement.

Dated: December 10, 1936.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants.

IT IS HEREBY STIPULATED that the foregoing Bill of Exceptions were prepared within the time allowed by law and correctly sets forth all of the proceedings had and is correct in all respects and may be approved, allowed and settled.

Dated: December 10, 1936.

DINKELSPIEL & DINKELSPIEL
By DAVID K. LENER
Attorneys for Plaintiff
TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants

The undersigned Judge, who tried the above entitled cause, hereby certifies that the above and fore-

going Bill of Exceptions contains all of the evidence given or offered on the trial of the said cause and correctly shows all of the proceedings had on said trial and is correct in all respects; and said Bill of Exceptions is hereby approved, allowed and settled and made a part of the record herein within the time allowed by rules of court and extensions duly allowed pursuant to said rules.

Dated: December 10th, 1936.

HAROLD LOUDERBACK
Judge of the United States
District Court. [188]

[Endorsed] Filed Dec 27 1935.

Receipt of a copy of the within Petition for Appeal is hereby admitted this 27 day of December, 1935.

DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiff

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL.

Now come HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SONS, a copartnership, the defendants above named, and petition this Court for an appeal herein, and respectfully shows: [189]

That this is an action for damages for breach of contract. That said action came on for trial in the above entitled court before the court sitting with a jury. After the introduction of the evidence, the argument of counsel, and the instructions of the Court, the jury returned its verdict in favor of the plaintiff and against the said defendants, and judgment upon said verdict was entered in the above entitled court on the 1st day of November, 1935, said judgment being in the sum of Seven Thousand Five Hundred Four and 02/100 Dollars ($7,504.02), with plaintiff's costs taxed at the sum of Fifty-eight and 35/100 Dollars ($58.35). That defendants' petition for a new trial duly filed herein was denied on December 5, 1935.

That the above named defendants, feeling aggrieved by the said judgment and the proceedings had prior thereto in said cause, desire to appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and the reasons for their said appeal are set forth in their assignment of errors filed herewith, all of which errors were committed in said cause to the prejudice of said defendants.

WHEREFORE, defendants pray that their appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of said errors so complained of, and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based and rendered, duly authenticated, be sent to the said Circuit Court of

Appeals under the rules of said court in such cases made and provided; and that said cause may be reviewed and determined and said judgment, and every part thereof, reversed, set aside and held for naught and judgment entered in favor of defendants and against plaintiff, and for such further relief or remedy [190] in the premises as the Court may deem appropriate.

Dated this 26th day of December, 1935.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants.

ORDER ALLOWING APPEAL

The foregoing appeal is hereby allowed this 28th day of December, 1935, upon the giving of a bond as required by law in the sum of Two Hundred Fifty Dollars ($250.00) for costs.

HAROLD LOUDERBACK
District Judge. [191]

[Endorsed]: Filed Dec 27 1935.

Receipt of a copy of the within Assignment of Errors is hereby admitted this 27 day of December, 1935.

DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiff

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Now come defendants HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually, and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, a copartnership, appellants herein, and make and file this, their Assignment of [192] Errors.

1. The court erred in denying defendants' motion for a directed verdict made after plaintiff rested his case, in that plaintiff had failed to introduce evidence sufficient to go to the jury in that the uncontradicted evidence offered by plaintiff disclosed that plaintiff and defendants had never entered into a written contract for the sale of asparagus and that all negotiations had between plaintiff and defendants were preliminary to the execution of a contract which was never executed.

2. The Court erred in denying defendants' motion for a directed verdict made at the conclusion of the trial in that plaintiff failed to introduce evidence sufficient to go to the jury in that the uncontradicted evidence offered by plaintiff and defendants disclosed that plaintiff and defendants had never entered into a contract for the sale of asparagus and that all negotiations had between plaintiff and defendants were preliminary to the execution of a written contract which was never executed and which negotiations were mutually abandoned.

3. The Court erred in denying defendants' mo-

tion for a directed verdict made at the conclusion of the trial in that plaintiff failed to introduce evidence sufficient to go to the jury in that plaintiff failed to introduce competent evidence to prove the alleged damages suffered by him.

4. The Court erred in holding that there was any evidence of a contract upon the part of defendants sufficient to go to the jury in that the uncontradicted evidence discloses that plaintiff and defendants had never entered into a contract as alleged in plaintiff's complaint, or at all.

5. The Court erred in holding that there was sufficient evidence of damages suffered by the plaintiff to go to the jury [193] in that the record discloses that plaintiff failed to prove the alleged damages suffered by him.

6. That the evidence is insufficient to support the verdict and judgment in that it shows that plaintiff and defendants never entered into a contract for the sale of asparagus and that plaintiff had failed to prove the damages alleged to have been suffered by him.

7. There is no evidence that plaintiff and defendants were to be bound by the two telegrams, "Plaintiff's Exhibits 2 and 3" in that the undisputed evidence shows that plaintiff and defendants were not to be bound until a contract in writing was prepared and signed by plaintiff and defendants and approved by the above entitled court; that although a contract in writing was prepared by the attorneys for plaintiff, "Plaintiff's Exhibit 7", it was not signed by either plaintiff or defendants or approved by the court.

8. There is no evidence that plaintiff suffered damages in the sum of Seven Thousand Five Hundred Four and 02/100 Dollars ($7,504.02), the verdict of the jury and the judgment entered herein, in that the undisputed evidence showed that plaintiff's records, "Plaintiff's Exhibit 8", upon which plaintiff relied to show damages, did not contain a true statement of all moneys collected and due plaintiff from the sale of the asparagus, the subject matter of this action.

9. There is no evidence that the price received by plaintiff for bunched asparagus, the subject matter of this action, was the then prevailing market price, in that there was no competent evidence of the then prevailing market price. [194]

10. That the uncontradicted evidence in the case shows that plaintiff and defendants did not enter into a contract for the sale of asparagus but had certain preliminary negotiations for the execution of a written contract, which negotiations were abandoned.

11. That it appears from the face of the record that the verdict resulted from conjecture and chance in that there was no competent evidence introduced from which the jury could have found damages in the amount rendered in its verdict.

12. That the Court erred in admitting into evidence over the defendants' objection and exception testimony of the plaintiff to the effect that there had been a prior oral agreement as to the terms of the alleged written contract except as to the price

at which the asparagus was to be sold, in that plaintiff's cause of action was based solely upon a contract in writing.

13. That the Court erred in admitting into evidence over defendants' objection and exception plaintiff's Exhibit No. 3, consisting of a telegram sent by defendants to plaintiff, stating that defendants will arrange to guarantee payment for all bunch asparagus at the price mentioned and that plaintiff could draw up a contract between them in that said telegram did not constitute an acceptance of plaintiff's offer to sell asparagus to defendants.

14. That the Court erred in admitting into evidence over the defendants' objection and exception plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, in that [195]

(a) Plaintiff's Exhibit 8 was not prepared by plaintiff from data or figures within his knowledge.

(b) Said exhibit was prepared without the knowledge of defendants.

(c) Said Exhibit did not constitute a true and correct report and account of all moneys received by and due to plaintiff from the sale of the asparagus referred to in plaintiff's complaint; and

(d) Said Exhibit was not an original, permanent and regular book of account kept by plaintiff.

15. The Court erred in admitting into evidence over the defendants' objection and exception Plaintiff's Exhibit No. 9, which consists of papers entitled "The Federal Market News" and purporting to show the market value of the asparagus sold by plaintiff at the time of the sale thereof, in that said papers were not certified as authentic by the United States Department of Agriculture.

16. That the Court erred in permitting plaintiff to testify over the objection and exception of defendants that he believed he was obligated to deliver the asparagus to defendants on defendants furnishing him with a satisfactory guarantee, in that the plaintiff's belief as to his rights was immaterial to the determination of the existence of a contract and that the admission of such testimony permitted the jury to believe that plaintiff's belief was evidence of the existence of a contract.

17. That the Court erred in admitting into evidence over the defendants' objection and exception testimony of the plaintiff to the effect that he believed that the entire contract between himself and the defendants was embodied in plaintiff's Exhibits 2 and 3, which answer was given in response to a ques- [196] tion by the court, in that the belief of the plaintiff could have no bearing on the question as to whether or not a contract had been entered into and the question having been put by the court, it tended to influence the jury to believe that said question and answer were material in determining the existence of a contract.

18. That the Court erred in refusing to admit into evidence on behalf of defendants, to which refusal defendants noted an exception, defendants' Exhibit "A" for identification consisting of copies of drafts and letters of credit showing the usual practice of the defendants in arranging satisfactory bank guarantees, in that said evidence would have disclosed what defendants understood by the term "satisfactory guaranty" as said term was used in Plaintiff's Exhibit 3.

19. That the Court erred in refusing to admit into evidence on behalf of defendants, to which refusal defendants noted an exception, defendants' Exhibit "C" for identification, consisting of a letter sent by Martin J. Dinkelspiel, Esq., to defendants herein, wherein it was set forth that defendants had agreed with plaintiff to take all the green asparagus raised by plaintiff prior to April 5, 1934, but that defendants failed and refused to furnish a satisfactory guaranty and that by reason of said refusal plaintiff sold said asparagus in the open market and suffered damages in the sum of $18,000.00, in that said defendants' Exhibit "C" for identification disclosed that plaintiff and defendants had not entered into the written contract set forth in plaintiff's complaint, and said letter tended to impeach the testimony of plaintiff and said Martin J. Dinkelspiel adduced on behalf of plaintiff.

20. That the court erred in denying defendants' motion [197] for a new trial in that the undisputed evidence disclosed that plaintiff and defendants had

never entered into a contract in writing for the sale of the asparagus, and that the undisputed evidence disclosed that all negotiations by and between the plaintiff and defendants with reference to the alleged contract sued upon were abandoned.

21. That the Court erred in denying defendants' motion to strike out the testimony given by the plaintiff to the effect that there had been a prior oral agreement as to the terms of the alleged written contract, to which an exception was noted, in that plaintiff's cause of action was based solely upon a contract in writing.

22. That the Court erred in denying defendants' motion to strike out plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, to which an exception was noted, for the same reasons that the Court erred in admitting said Exhibit 8 into evidence as more fully appears from Assignment of Error No. 14.

23. That the Court erred in stating in the presence of the jury, to which an exception was noted:

> "The COURT: There is no harm in hearing either one of them state he thought he made a contract or not. In other words, that doesn't pass upon the legality of a contract, but his attitude in connection with the testimony he is giving. I see no objection to that, because it is his personal attitude. I will allow it to stay in the record.

which statement was made after plaintiff and defendants had stipulated that the plaintiff's answer "I did" to the following question might go out of the record:

> Mr. DINKELSPIEL: Q. After the receipt of the wire of February 13, 1934, from Mr. Rothstein, did you believe, as far as you were concerned you were bound under that obligation to deliver your asparagus to Mr. Rothstein on his furnishing you with a satisfactory guarantee? [198]

n that the statement of the Court was tantamount o an instruction to the jury that the fact that the plaintiff thought he had obligated himself was evilence of the existence of a contract.

24. The Court erred in giving the following instruction to the jury, to which exception was noted, n that the uncontradicted evidence discloses that plaintiff and defendants were not to be bound until he proposed agreement was reduced to writing, igned by the parties and approved by the court, nd the court failed to instruct the jury what was neant by "ordinarily":

> Where parties through written correspondence reach a specific and definite agreement, intending that the agreement shall be subsequently expressed formally in a single paper, which shall be the evidence of what has been agreed upon, the obligatory character of the agreement

cannot ordinarily be defeated by the failure of either party to sign the formal contract.

25. The Court erred in giving the following instruction to the jury, to which exception was noted, in that said instruction is contrary to law for the reason that the intention and understanding of the parties according to the Statute of Frauds must be ascertained from the alleged written contract:

> You are instructed that the plaintiff, in support of the allegations of his complaint has introduced in evidence two telegrams, one addressed from the plaintiff to the defendants and the other from the defendants to the plaintiff. For the purpose of explaining the terms used by the parties, evidence has been introduced. The Court instructs you that if you find from the evidence that the plaintiff offered to sell all of the asparagus grown by the Golden State Asparagus Company during the period specified in the telegram sent by the plaintiff, and the defendant by its telegram offered to purchase all bunch asparagus grown by the Golden State Asparagus Company during the time specified in the telegrams, then you are to determine from the evidence if the plaintiff and defendants understood the same thing as to what was being offered for sale and what was agreed to be purchased.

26. The Court erred in giving the following instruction to the jury, to which exception was

noted, in that said instruction is contrary to law for the reason that the intention and [199] understanding of the parties according to the Statute of Frauds must be ascertained from the alleged written contract:

> If you therefore find from the evidence that plaintiff, in sending his wire under date of February 12, 1934, to the defendant, confirmed a verbal understanding or agreement and that the defendant with full knowledge of that prior understanding sent his telegram under date of February 12, 1934, in acknowledgment of plaintiff's telegram, and also confirming said transaction, you will find in favor of the plaintiff.

27. The Court erred in refusing to give the defendants' proposed instruction No. 23, to which refusal an exception was noted, in that the parties must be deemed to have contracted with reference to the custom and usage of the produce trade, said proposed instruction being as follows:

> You are instructed that if you find from the evidence that plaintiff and defendants entered into a contract for the sale of the asparagus described in plaintiff's telegram and that thereafter the defendants offered to post a satisfactory bank guarantee according to trade custom and usage of the produce trade, but that plaintiff refused to accept same, then you are instructed that the defendants did not breach the contract with plaintiff and your verdict must be for defendants.

28. The Court erred in refusing to give the defendants' proposed instruction No. 26, to which an exception was noted, in that the parties must be deemed to have contracted with reference to the custom and usage of the produce trade, said proposed instruction being as follows:

> You are instructed that if you find from the evidence that it is the usage and custom of the produce trade that before a contract for the sale and purchase of asparagus is consummated the parties to the contract must agree as to the grade, size, pack, whether bunched or loose, number of inches in length and diameter and percentage of green color in the asparagus, and if you find that the plaintiff and defendants did not agree as to the grade, size, pack, whether bunched or loose, number of inches in length and diameter and percentage of green color in the asparagus to be sold defendants, then you are instructed that no contract was entered into between plaintiff and defendants, and your verdict must be for defendants. [200]

29. The Court erred in refusing to give the defendants' proposed instruction No. 29, to which refusal an exception was noted, for the reason that the facts in this case disclosed that the proposed contract, "Plaintiff's Exhibit 7", embodied terms additional to the terms contained in the telegrams, "Plaintiff's Exhibits 2 and 3", said proposed instruction being as follows:

You are instructed that if you should find that the terms and conditions sought to be contained in the written contract tendered by plaintiff to defendants embodied terms additional to those agreed upon by plaintiff and defendants and that the minds of the parties did not meet as to the additional terms, then you are instructed that no contract was entered into and your verdict must be for defendants.

30. The Court erred in refusing to give the defendants' proposed instruction No. 30, to which refusal an exception was noted, in that the uncontradicted evidence discloses that plaintiff and defendants were not to be bound until their proposed agreement was reduced to writing and signed by them and approved by the Court, said proposed instruction being as follows:

If you find from the evidence that the plaintiff and the defendants intended that the negotiations had by them for the sale of asparagus pursuant to the telegrams offered in evidence would be reduced to a written contract to be thereafter executed between them and that the plaintiff and defendants failed to agree upon the terms of said written contract, then the Court charges you that no contract was entered into between plaintiff and defendants and your verdict must be for the defendants.

31. The Court erred in refusing to give the defendants' proposed supplemental instruction No. 2, to which refusal an exception was noted, in that

the parties must be deemed to have contracted with reference to the custom and usage of the produce trade, said proposed instruction being as follows:

> You are instructed that if you find from the evidence that in accordance with the use and custom of produce dealers that before a contract for the sale and purchase of asparagus is finally consum- [201] mated the parties to the contract reduced their agreement in writing as to the grade, size, pack, whether bunched or loose, number of inches in length and diameter and percentage of green color in the asparagus contracted for, and if you further find from the evidence that the plaintiff and defendants had agreed that a form of contract would be executed by them so as to describe the grade, size, pack, whether bunched or loose, number of inches in length and diameter and the percentage of green color in the asparagus to be sold defendants, and that said written form of contract was never executed between the plaintiff and defendants, then you are instructed that plaintiff and defendants did not enter into a contract for the sale by plaintiff and the purchase by the defendants of asparagus and your verdict must be for the defendants.

32. The Court erred in refusing to give the defendants' proposed supplemental instruction No. 3, to which refusal an exception was noted, for the reason that the undisputed evidence in this case discloses that the proposed contract was not to be

binding upon plaintiff until the approval of the above entitled court was obtained, said proposed instruction being as follows:

> You are instructed as a matter of law that a contract, in order to be binding, must be equally binding upon both parties to the contract with the same force and effect. Therefore, if you should find from the evidence that the plaintiff intended that any contract proposed to be entered into between plaintiff and defendants would not be binding upon plaintiff, as receiver of the Golden State Asparagus Company, until the approval of this court was obtained, then the court instructs you that the defendants were not bound by said contract until the approval of the court was obtained.

33. That the verdict and judgment are contrary to law in that the two telegrams "Plaintiff's Exhibits 2 and 3", upon which plaintiff based the contract in writing alleged in his complaint, did not constitute a sufficient writing within the meaning of the Statute of Frauds to make a written contract.

34. That the verdict and judgment are contrary to law in that the telegram sent by defendants to plaintiff, "Plaintiff's Exhibit 3", did not constitute an acceptance in writing of plain- [202] tiff's offer, "Plaintiff's Exhibit 2", in that plaintiff offered to sell all shipping asparagus if a satisfactory bank guarantee was given, whereas the defendants

offered to buy all bunched asparagus and to give a satisfactory guarantee.

35. That the verdict and judgment are contrary to law in that the evidence is undisputed that plaintiff and defendants abandoned all negotiations with reference to the proposed contract upon which plaintiff's case is based.

36. That the verdict and judgment are contrary to law in that the evidence is undisputed that plaintiff and defendants were not to be bound until a written contract was prepared and signed by plaintiff and defendants and approved by the above entitled court.

37. That the verdict and judgment are contrary to law in that the evidence is undisputed that the records of plaintiff, "Plaintiff's Exhibit 8", were incompetent to show alleged damages suffered by plaintiff in that it appears without contradiction from the evidence that

(a) The pages offered in evidence were not the original, permanent and regular books of account kept by plaintiff.

(b) The said pages were prepared from figures and data not within the knowledge of plaintiff and were furnished to plaintiff by third persons not in the employ of plaintiff.

(c) The said pages did not constitute a true and correct report and account of moneys received and due to plaintiff from the sale of the asparagus, the subject matter of this action.

WHEREFORE, appellants pray that by reason of the errors aforesaid contained in these Assign-

ments of Error, the judgment and verdict rendered against them be reversed and held for naught and said action finally dismissed.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants
and Appellants. [203]

[Title of Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That the MASSACHUSETTS BONDING AND INSURANCE COMPANY, a body corporate duly incorporated under the laws of the State of Massachusetts and authorized to act as Surety under the Act of Congress approved August 13th, 1894, as amended by the Act of Congress approved March 23, 1910, whose principal office is located in the City of Boston, Massachusetts, and duly authorized to transact business and issue surety bonds in the State of California, as Surety, is held and firmly bound unto GEORGE N. EDWARDS as Receiver in Equity of GOLDEN STATE ASPARAGUS COMPANY, a corporation, in the full and just sum of Two Hundred Fifty and no/100 Dollars ($250.00), lawful money of the United States of America, for which payment well and truly to be made, we bind ourselves, and our heirs, executors, administrators and successors, firmly by these presents.

Signed, sealed and dated this 30th day of December, A. D. 1935.

WHEREAS, lately at a regular term of the District Court of the United States for the Southern Division of the Northern District of California, in a suit pending in said Court between GEORGE N. EDWARDS as Receiver in Equity of GOLDEN STATE ASPARAGUS COMPANY, a corporation, Plaintiff, and HENRY ROTHSTEIN, M. H. ROTHSTEIN, I. ROTHSTEIN, JOHN DOE and RICHARD ROE, individually and as co-partners doing business under the firm name and style of H. ROTHSTEIN & SONS, a corporation, Defendants, a judgment was rendered against the said Defendants, and the said Defendants having obtained from said Court an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, [204]

NOW, THEREFORE, the condition of the above obligation is such, that if the above named Defendants shall prosecute their appeal to effect, and answer all costs which may be awarded against them, as such appellants, if such appeal is not sustained, then this obligation shall be void; otherwise to remain in full force and virtue, and the said Surety agrees that in case of a breach of any condition hereof said Court may, upon notice to it of not less than ten (10) days, proceed summarily in this action to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution thereof, not exceeding, however, the sum

specified in this undertaking.

MASSACHUSETTS BONDING AND INSURANCE COMPANY

[Seal] By J. R. McKINNEY

Attorney in Fact

(Signature of J. R. McKinney acknowledged before Notary Public Dec. 30, 1935.)

Approved: 12/30th/35.

HAROLD LOUDERBACK,
U. S. Dist. Judge.

[Endorsed]: Filed Dec. 1935. [205]

[Endorsed]: Filed Dec. 30, 1935.

[Title of Court and Cause.]

ORDER RE TRANSMISSION OF ORIGINAL EXHIBITS

Upon application of counsel for the defendants in the above entitled action,

IT IS HEREBY ORDERED that in connection with the appeal of the said defendants to the United States Circuit Court of Appeals for the Ninth Circuit Plaintiff's Exhibit No. 8 may be trans- [206] mitted to the said Appellate Court for its inspection.

Dated: December 28th, 1935.

HAROLD LOUDERBACK
United States District Judge [207]

[Endorsed]: Filed Dec. 12, 1936.

Receipt of a copy of the within Amended Praecipe is hereby admitted this 10th day of Dec. 1936.

DINKELSPIEL & DINKELSPIEL
Attorneys for Plaintiff

[Title of Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court, in and for the Northern District of California, Southern Division:

Please disregard the Praecipe for Transcript of the Record heretofore filed herein, and prepare a transcript of the record for the purpose of an appeal to the United States Circuit Court [208] of Appeals for the Ninth Circuit from the judgment made and entered in the above entitled cause on the 1st day of November, 1935, and include therein the following:

The Complaint.

Answer of Defendants.

The Judgment.

The Bill of Exceptions as settled.

Defendants' Petition for Appeal.

Order Allowing Appeal.

Assignment of Errors.

Bond on Appeal.

Citation.

Order authorizing original exhibit to be transmitted to Appellate court.

This amended praecipe.

You will also please forward in addition to said transcript the plaintiff's Exhibit No. 8 introduced in evidence in the trial of said cause.

Dated: December 10, 1936.

TORREGANO & STARK
By ERNEST J. TORREGANO
Attorneys for Defendants. [209]

[Title of Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 209 pages, numbered from 1 to 209, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause entitled George N. Edwards, Etc., Plaintiff, vs. Henry Rothstein, et al, Defendants, No. 19830-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $25.40 and that the said amount has been paid to me by the Attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of December, A. D. 1936.

[Seal] WALTER B. MALING
Clerk.

J. P. WALSH
Deputy Clerk. [210]

United States of America—ss.

The President of the United States to GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company, a corporation, Plaintiff and Appellee,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. ROTHSTEIN & SON, a copartnership, defendants, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said apepllants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harold Louderback, United States District Judge for the Northern District of California, this 30th day of December, A. D. 1935.

HAROLD LOUDERBACK,
United States District Judge. [211]

Receipt of a copy of the within Citation on Appeal is hereby admitted this ..... day of January, 1936.

DINKELSPIEL & DINKELSPIEL.

[Endorsed]: Filed Jan. 3, 1936.

[Endorsed]: No. 8412. United States Circuit Court of Appeals for the Ninth Circuit. Henry Rothstein, M. H. Rothstein and I. Rothstein, individually and as copartners doing business under the firm name and style of H. Rothstein & Son, a copartnership, Appellants, vs. George N. Edwards, as receiver in equity of Golden State Asparagus Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 17, 1936.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.